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UNITED STATES SUPREME COURT
October Term 1991

RALPH BAGGS; VERN BAGGS, JR.; GARY A. DELECKI; LORI J. GLICK; MERRILL J. HANSEN; TRACY HELSEL; ROBERT KANAZIZ; ANTHONY F. KROL; PENNY J. PAHL; GARY PARKER; GARY ROESSLER; MARK RUSSELL; DAVID WILSON; MARY ANN FENDER; WALTER MONTNEY; PATRICIA RUSSELL; DANIEL SCHELSKE; NADINE WELLS; JAMES D. WILSON, II; JAMES MacDONALD,

Plaintiffs-Petitioners,

THOMAS A. BROWN; BILL ELYA, III; GARRY MOORE; TIMOTHY MORRISON; DEANE W. PAHL,

Plaintiffs,

-v-

EAGLE-PICHER INDUSTRIES, INC., an Ohio corporation,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the scope and extent of employee privacy rights in the course of employment? Petitioners were employees at an automotive parts manufacturing plant. Sweeping company policy changes focused on the detection of illegal drug usage by employees. Workers were required to submit to unannounced mass urinalysis screening as a condition of their employment. Employees "failing" the test, or refusing to provide a urine sample, were fired.

2. May a private employer unilaterally alter its employment policies to provide for employee termination for "failure" to pass a drug test or refusal to submit to urinalysis when the employees had previously been subject to a progressive disciplinary

system? Respondent issued an employee handbook providing a progressive disciplinary scheme for employees. The handbook was altered to provide for summary termination of employment if illegal drugs were detected in an employee's body, or if the employee refused to submit to a urine screening for illegal drugs. The changes were incorporated in a revised employee handbook issued two days before an unannounced mass taking of urine samples from employees.

3. Are statements made by an employer to the press regarding employee termination for refusing to submit to urinalysis defamatory. The Respondent's Division President issued a statement published by local news media that employees "who knew they were illegal

drug users" could voluntarily leave the plant prior to the taking of urine samples. These employees would be considered a voluntary quit. Several employees did leave the plant, and were terminated.

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STATEMENT OF JURISDICTION

Petitioners filed suit in the Michigan Circuit Court for Kalkaska County on August 28, 1989, alleging breach of contract, contract misrepresentation, defamation, invasion of privacy, and negligence. Respondent Eagle-Picher removed the case to the United States District Court for the Western District of Michigan, Southern Division, on September 25, 1989, under that Court's diversity jurisdiction. On Motion of Eagle-Picher, the Honorable Robert Holmes Bell granted Summary Judgment, pursuant to Fed. R. Civ. Pro. 56(c), in Eagle-Picher's favor on all of the discharged employees' claims. The Court's Order was issued on July 30, 1990.

Petitioners appealed the District Court's decision to the Sixth Circuit Court of Appeals. Oral argument was heard on January 21, 1992; the Sixth Circuit issued its opinion affirming the District Court's decision on February 27, 1992.

This Court has jurisdiction to hear an appeal of the Sixth Circuit's decision pursuant to 28 U.S.C. §1254.

STATEMENT OF THE CASE

This appeal involves three claims decided adversely to Petitioners on a Motion for Summary Judgment in the District Court:

1) Invasion of privacy, including the balance between an individual's reasonable expectation of privacy and an

employer's privilege to maintain an orderly and productive workplace;

2) Wrongful Discharge, particularly the applicability of an employee handbook as creating an employment contract and the reasonableness of notice of a change in policies prior to implementation of those policies; and

3) Defamation and the scope of the public interest qualified privilege to defame.

The case focuses on the level of intrusion into private affairs and curtailment of personal liberty which an employer may exercise over its employees. In 1989, Eagle-Picher Industries commenced plant-wide drug testing at its Kalkaska, Michigan facility. Employees "failing" the test, and personnel refusing to submit to the taking of a

urine sample, were fired. Terminated employees challenged the company's actions in court.

Eagle-Picher Industries, Inc. (hereinafter referred to as "Eagle-Picher"), is an Ohio corporation with its principal offices located in Cincinnati. Eagle-Picher operates a Trim Division in Kalkaska, Michigan, manufacturing automotive parts. The plant has previously been known as Fabricon Automotive Products and Wolverine Gasket. Eagle-Picher is the largest employer in Kalkaska, during the time relevant to this action employing 230 people.

Applicants for employment at Eagle-Picher's Kalkaska facility completed a form which contained an at-will employment disclaimer. Upon hiring, each new employee was furnished an

employee handbook. The handbook in force until August 7, 1989 was promulgated when the plant was known as Fabricon Automotive Division. The company felt that "[a] good relationship between the employees and management here at Fabricon is something that is very important to the future of our company." The handbook informed employees that the company was "...committed to developing the best possible working conditions for its workers. Fair and equal treatment to all its employees, good benefits, and personal respect are important qualities that Fabricon tries to provide for its workers."

Following its "fair and equal treatment" theme, the handbook listed a series of rules and regulations that employees were expected to obey. Use or

possession of illegal drugs or alcohol on company premises was proscribed in this list. A progressive disciplinary system was emplaced to enforce the company's rules and regulations. The system advanced from a verbal warning of misconduct, through two written warnings, and culminated in discharge from employment. The company noted that the disciplinary procedure may not always be followed, depending on the severity of the offense. The handbook immediately assuages potential employee fears, however, by stating:

> If any employee receives disciplinary action which they feel is unfair, management will have an open ear and listen to your complaint. A discussion of all the facts should reveal the most fair decision. The most important point that should be made when disciplinary action occurs is that it is done in the most

fair and equitable manner possible.

The procedures outlined in the Fabricon Handbook worked well until Division President Michael Aslanian, sometime in late 1988, began to believe that his workforce suffered from widespread drug use. An employee allegedly commented to Mr. Aslanian about the effect of drug usage on plant productivity. Neither the date of the comment nor the name of the employee have ever been revealed. Company management is also supposed to have overheard truck drivers and a building contractor talking about employee drug use. Again, the members of "company management" remain anonymous, as do the truck drivers and the contractor. Similarly, "one of the supervisors" apparently overheard a reference to the plant as a "drug house"

in a CB radio conversation. The date of the conversation and the name of this supervisor are also a mystery.

Despite the amorphousness of its evidence, Eagle-Picher acted on its now escalating preoccupation with illegal drugs. In the spring of 1989, a "Drug Free Workplace Policy" was posted in the plant. The new policy, nearly identical to the rule listed in the Fabricon Handbook, prohibited employees from possessing, using or being under the influence of alcohol or drugs while at work and detailed the circumstances in which an employee could be asked to submit to a drug test.

Mr. Aslanian also secured the placing of an undercover police agent in the Kalkaska plant. The undercover agent estimated that 60 percent of Eagle-

Picher's Kalkaska employees used drugs. This equates to 140 men and women, out of a then total work force of 230. A number of the supervisors were said to be drug users. Although some employees have admitted drug use, no documentation exists to support the unknown agent's fantastic accusations. Eagle-Picher does not show any work slowdowns, accidents or disciplinary problems linked to employee drug use.

At a meeting in June of 1989, Respondent's management considered the perceived problem. Eschewing any approach based on individualized cause or suspicion, Eagle-Picher resolved to simply cast a dragnet: plant-wide urinalysis. Yet another "Drug Free Workplace Policy" was handed down to the work force on July 17, 1989, but copies

were not furnished to individual employees until August 7 and 8, 1989. The new policy built upon the old but differed substantially in content and meaning, stating that "reporting to work with alcohol, illegal or illicit drugs in the employee's system is a violation of company rules and will result in disciplinary action, up to and including discharge." (Emphasis supplied).

The revised drug policy was incorporated in an amended employee handbook, distributed on August 7 and 8, 1989. The new handbook is substantially the same as the prior Fabricon Handbook, indeed most of the Fabricon Handbook is merely copied. Accordingly, the 1989 Eagle-Picher Handbook restates the importance of "[a] good relationship between the employees and management"

and that "[a]ll employees at our plant in Kalkaska are to be treated fairly and respectfully." The only substantive differences between the Fabricon and Eagle-Picher Handbooks are seen in the Rules and Regulations and Conclusion. The Eagle-Picher Handbook incorporates the ten Fabricon Rules and Regulations word for word, but adds an eleventh:

> 11. Refusal to submit to substance testing for alcohol, drugs or any form of controlled substance upon request by the Company.

The last rule gives teeth to the drug policy adopted in the August manual. Compliance with the policy being made a condition of employment. Finally, Eagle-Picher added a disclaimer to the Conclusion of its new handbook:

> This handbook, with its rules and regulations, is not to be considered as generating terms and conditions of an employee contract. You have the right to terminate

> your employment at any time without notice, and without cause, and the company maintains the same right.

Eagle-Picher allowed its employees two days in which to decipher the new, 49 page handbook. Then, on August 10, 1989, Respondent unleashed its urinalysis program. Eagle-Picher cloaked the program in secrecy. Only Mr. Aslanian, Personnel Manager Mark Guy, and Assistant Personnel Manager Julie Miller, were privy to the date, or even the existence, of the drug testing.

Eagle-Picher hired Drug Services Intervention Administration to conduct the testing. The urine collection was done by ABCO International Security Corporation (hereinafter referred to as "ABCO"). ABCO's two-man collection team flew in from Houston, met with Eagle-Picher management to arrange logistics, and conducted the urine collection process -- all within 36 hours.

Arriving at the Kalkaska plant at 2:15 in the afternoon, Mr. Dorbritz and Mr. Taylor set up the men's and ladies' restrooms for testing. One male and one female nurse were assigned to assist in the collection process.

Upon reporting to work, the plant's second shift was called to an employee meeting where Mr. Aslanian revealed the drug testing program. Employees were given the choice of submitting to the test, or leaving the plant and thus losing their jobs. Ten individuals, Ralph Baggs, Vern Baggs, Gary Delecki, Nadine Wells, Mark Birgy, Thomas Brown, Penny Pahl, Gary Roessler, Patricia Russell, and Robert Kanaziz refused to submit and were fired.

Groups of the remaining employees were directed into the restrooms at 3:30 p.m. Each employee was required to sign a "Urinalysis Consent Form," and was provided a

collection jar which they were expected to fill. A nurse observed the collection process.

After about an hour, Eagle-Picher's labor relations manager, Chip Lewis, approached Mr. Dorbritz, pressuring for a faster collection process. Mr. Lewis though that 35 samples could be obtained per hour. Someone, possibly Chip Lewis, also spoke to Mr. Taylor along similar lines, saying that Mr. Dorbritz was working faster. Mr. Taylor replied that it took a little longer for the women. Mark Guy, Eagle-Picher's Personnel Manager, entered the men's restroom later, again seeking to expedite the process. Mr. Dorbritz informed him that the testing was proceeding as fast as possible. As several men who could not perform the function were milling about, a request was made at this time to have these men removed and watched.

Eagle-Picher would not allow the ABCO team any respite from the testing, which continued unabated until 9:45 that night. As no shipment could be made so late, the collected samples were retained in the ABCO team's hotel room.

Collection resumed on the morning of August 11 at 4:00 a.m. and lasted until 11:45 a.m. Eagle-Picher's representatives again disturbed the process, demanding that samples be taken faster. Mark Guy repeatedly shuffled through the ABCO team's papers, causing the count of samples to be lost. A "good estimate" of 234 to 237 was arrived at, however.

After the collection was completed, confusion attended the shipment of the samples. The team was unsure how to pack the samples. Apparently the samples (including the case kept overnight in the ABCO team's

hotel room) were shipped to Smith Kline Laboratories shortly after noon on Friday, August 11, 1989. One of the boxes was temporarily lost in shipment, being sent to Grand Rapids, shipped back to the Kalkaska Inn on Saturday, returned to Eagle-Picher, was finally retrieved by Airborne Express on Monday, August 14, and ultimately delivered to Smith Kline on Tuesday, August 15.

Subsequent to the testing, President Aslanian made repeated statements to local news media, including two newspapers (the Traverse City Record-Eagle, covering five counties, and The Leader and The Kalkaskian), and a dual television station, Channel 7 and 4 (an NBC affiliate whose combined coverage is beamed throughout northern Michigan). Mr. Aslanian told The Leader and The Kalkaskian that, prior to the urinalysis, employees were told:

> If you know you are an illegal drug user and feel you are going to be caught you have the option to leave the plant in a few moments and we will accept that as a voluntary quit.

The Leader and The Kalkaskian, Thursday, August 24, 1989 ed., p. 15.

A number of the fired employees have since commenced the pending action. The case, originally filed in a Michigan state court, was removed to the Federal District Court by Eagle-Picher, asserting diversity jurisdiction.

ARGUMENT

Petitioners seek a writ of certiorari from this Court to review the decision of the Sixth Circuit Court of Appeals.

Curing the devastation wrought by illegal drug usage is at the forefront of this nation's social policy. Business has suffered greatly from reduced productivity, diminishing quality, and increasing injuries

and sickness directly caused by employee abuse of controlled substances. As a result, employers are relying on drug use detection and prevention techniques to control escalating losses. In their haste to rally around the standard of the "war on drugs," however, business and community leaders have forgotten the principles of liberty and self-determination which have shaped this nation.

In recent years this Court has been called upon to formulate Constitutional standards balancing the needs of government, as an employer, to a safe and productive workforce against individual expectations of privacy protected by the Fourth and Fourteenth Amendments. These Constitutional strictures, however, do not apply to the private sector. Yet identical privacy concerns motivate individuals in private sector employment. Moreover, the majority of

Americans lack the ability, assumed in theory, to simply find other employment if their current employer's policies are objectionable. Most people need their jobs. The need for employment confers upon employers an ability to engage in conduct deemed reprehensible by a civilized society, unless employees have a means of challenging the objectionable conduct.

The employees in the case at bar contested Eagle-Picher's actions. The District and Circuit Courts applied Michigan law to the case, finding, in the words of the Sixth Circuit, "that a Michigan employer may use intrusive and even objectionable means to obtain employment related information about an employee." Opinion of the Sixth Circuit Court of Appeals, p. 14. This conclusion directly contradicts Michigan law on the

subject, constituting an unwarranted and damaging extension of privacy law.

Moreover, the United States Court of Appeals for the Third Circuit came to an opposing conclusion in Borse v. Piece Goods Shop, Inc., ____ F.2d ____ (3rd Cir., May 13 1992, Case No. 91-11917)(1192 U.S. App. LEXI 10368). The Borse plaintiff was discharged for refusing to consent to an employer mandated urine screening. Applying Pennsylvania law extremely similar to Michigan privacy law, the Third Circuit found that drug testing and personal property searches may violate the public policy underlying a tortious invasion of privacy claim. Accordingly, summary disposition in the employer's favor was held to be improper in that case.

Similarly, at least one District Court in the Fourth Circuit has ruled in a similar

fashion to Borse. In Twigg v Hercules Corp., 406 S.E.2d 52 (W. Va. 1990), the West Virginia Supreme Court was presented a certified question from the United States District Court for the Northern District of West Virginia. Again, considering facts highly similar to the present case, the West Virginia Supreme Court informed the District Judge that suspicionless private sector drug testing violated an individual employee's privacy.

This Court should exercise its jurisdiction to review the decision of the Sixth Circuit, in conflict with the Third Circuit and with Michigan law. See Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 206 (1938).

I

INVASION OF PRIVACY.

Petitioners have presented a valid claim for invasion of privacy entitled to survive summary judgment. Eagle-Picher's disregard for the personal dignity of its employees and investigation into matters it had no right to know constitutes an affront to privacy which the law recognizes as actionable. Privacy encompasses that sphere of an individual's life which no other may intrude upon. The Michigan Court of Appeals, citing 77 CJS, Right of Privacy, Section 1, pp. 396-97, defined privacy as:

> [T]he right of an individual to be let alone, or to live a life of seclusion, or to be free from unwarranted publicity, or to live without unwarranted interference by the public about matters with which the public is not necessarily concerned, or to be protected from any wrongful intrusion into an individual's private life which would outrage or cause mental

> suffering, shame, or humiliation to a person of ordinary sensibilities.

Earp v. Detroit, 16 Mich. App. 271, 275-76, 167 N.W.2d 841 (1969).

Michigan was one of the first states to acknowledge each citizen's right to privacy. Beaumont v. Brown, 401 Mich. 80, 93, 257 N.W.2d 522 (1977). The Michigan Supreme Court recognized four distinct privacy torts, quoting Prosser, Torts (4th ed.), Section 117, p. 804:

> 1. Intrusion upon plaintiff's seclusion or solitude, or into his personal affairs;
>
> 2. Public disclosure of embarrassing private facts about the plaintiff;
>
> 3. Publicity which places the plaintiff in a false light in the public eye;
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Beaumont at 95 n. 10. The Beaumont Court also noted that "[t]he right of privacy...has

yet to cease evolving." Id. at 94. The current case presents a great challenge to the development of privacy law.

Pennsylvania law, as applied by the Third Circuit in Borse, supra, parallels Michigan privacy concerns. Citing Marks v. Bell Telephone Co., 460 Pa. 73, 331 A.2d 424, 430 (1975), the Borse panel noted that Pennsylvania also recognizes the tort of "intrusion upon seclusion." Borse at ____ (1992 U.S. App LEXIS 10368). The Borse decision relies on Pennsylvania's acceptance of this tort in holding that employee urinalysis may be objectionable to a reasonable person, and therefore should survive a motion for summary judgment. This is exactly the argument advanced by the Petitioners in this case, but rejected by the District Court and Sixth Circuit Court of Appeals.

Mandatory mass urinalysis without cause is a significant intrusion upon an individual's solitude. To make out a claim of this nature, three elements must be present: 1) an intrusion by the defendant; 2) into a matter in which the plaintiff has a right of privacy; 3) by a means or method that is objectionable to a reasonable person. Saldana v. Kelsey-Hayes Co., 178 Mich. App. 230, 233, 443 N.W.2d 382 (1989). All three elements are present in this case.

Intrusion

The taking of a urine sample is intrusive upon a person's privacy, as is the subsequent analysis of the sample. The passing of urine is a highly private activity. Courts considering the issue, including the District Court in this case, have so concluded. For example, when obtained by government action, urinalysis:

> Compromise[s] legitimate expectations of privacy in two distinct ways. The taking of the bodily fluid intrudes physically upon the integrity of one's body and its functions. Although it is a waste product, urine is discharged privately. A reasonable person would not expect 'animals, children, snoops, and other members of the public' to rummage through one's urine, unlike garbage left at the curb. Second, analysis of blood and urine exposes to the government and public private facts about one's life. (Citations omitted.)

Amalgamated Transit Union v. Cambria County Transit Authority, 691 F. Supp. 898, 902 (W.D. Pa. 1988).

Writing of random urinalysis testing imposed upon fire fighters in Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D. N.J. 1986), the Court observed:

> Urine testing involves one of the most private of functions, a function traditionally performed in private, and indeed, usually prohibited in public.

A New Jersey Court found the monitoring of a person's urine to be "an intrusion upon the most private kind of conduct. Both in concept and in practice, that intrusion is profoundly demeaning." Fraternal Order of Police v. City of Newark, 216 N.J. Super, 461, 474, 524 A.2d 430 (App. Div. 1987). Similarly, the California Court of Appeals was "satisfied that urinalysis intrudes upon reasonable expectations of privacy." Luck v. Southern Pacific Transportation Co., 218 Cal. App.3d 1, 267 Cal. Rptr. 618, ___ P.2d. ___ (1990).

In a recent decision regarding urinalysis, this Court concluded that urine testing per se violates the right of privacy:

> [C]hemical analysis of urine, like that of blood can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may involve visual

> or aural monitoring of the act of urination, itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated:'There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed its performance in public is generally prohibited by law as well as social custom. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (CA 5 1987).'
>
> ...it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable[.]

Skinner v. Railway Labor Executives Ass'n., 489 U.S. 602, 109 S. Ct. 1402, 1413, 103 L.Ed.2d 639 (1989).

A Michigan court would find the foregoing analysis compelling. No Michigan decision treats the drug testing question now before this Court, but an analogous situation arose in Harkey v. Abate, 131 Mich. App. 177,

346 N.W.2d 74 (1983). Harkey involved the installation of viewing devices in the women's restroom of a roller-skating rink. The plaintiff and her daughter filed suit alleging intrusion upon seclusion. In upholding the plaintiff's claim, the Court of Appeals stated:

> Clearly, plaintiff and her daughter in this case had a right of privacy in the public restroom in question. In our opinion, the installation of the hidden viewing devices alone constitutes an interference with that privacy which a reasonable person would find highly offensive. (Emphasis supplied).

Id. at 182. As the mere installation of viewing devices designed to observe the act of urination is invasive of privacy, so is the forced taking and analysis of a person's urine.

Expectation of Privacy

Petitioners similarly demonstrate the second element of their intrusion into

seclusion claim: that the matter intruded upon be the subject of a legitimate privacy expectation. Eagle-Picher urges that an employee's privacy expectations cease upon entering the workplace. The Sixth Circuit accepted this principle in formulating its decision.

Petitioners acknowledge that the right to privacy is not absolute. Earp, supra, 16 Mich. App. at 276.

> In determining the extent of the right of privacy, it is essential to consider it in the light of duties imposed on individuals as citizens of a free country and in the light of an individual's relation to the community of which he is a member, and such right does not extend so far as to subvert those rights which spring from social conditions, including business relations, or to prohibit the publication of matter which is of public or general interest or benefit.

Earp at 276 (quoting 77 CJS, Right of Privacy, Section 3, pp 401-02). The District

Court and the Sixth Circuit, relying on Saldana v. Kelsey-Hayes Co., supra, 178 Mich. App. 230, placed far too much emphasis on the right of the employer to a productive workplace.

In Saldana, an employer suspected an employee of malingering. The worker had complained of injuries incurred in a fall at work. The defendant employer hired an investigative firm to determine if plaintiff's injuries were genuine. Investigators observed plaintiff through the window of plaintiff's house, using both the unaided eye and a powerful camera lens; telephoned plaintiff to determine that he was at home; and talked to trash collectors who had just visited plaintiff's home. Saldana at 232. The Court of Appeals determined that such conduct was not invasive of plaintiff's privacy due to the employer's interest

arising from the business relationship of the parties, protecting itself from legal liability. Saldana at 235.

Applying Saldana to the instant case overly stretches the rights conferred by the business relationship. Saldana is distinguishable in that Eagle-Picher is not seeking to forestall any legal liability. More importantly, the level of intrusiveness in the present case is far more egregious. Suspicionless seizures of urine are no less humiliating at work than in any other context. The employment relation requires the employee to complete work in a competent, safe and efficient manner. Absent a reasonable suspicion that a particular employee is shirking work or poses a danger, Eagle-Picher may not order a urinalysis.

Application of federal constitutional principles are instructive in determining the

extent of an employer's right to infringe on a worker's privacy. The policies underlying constitutional privacy and common law privacy cases are extremely similar. Although the trial court correctly points out that the Fourth Amendment is inapplicable to private employers, see Skinner v. Railway Labor Executives Ass'n., supra, 489 U.S. at ____, 109 S. Ct. at 1411, the parallels between governmental and private urinalysis are unmistakable. "The essential purpose of the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials in order to safeguard the privacy and security of individuals against arbitrary invasions by government officials. The Fourth Amendment thus gives concrete expression to a right of the people which is basic to a free society."

Capua v. City of Plainfield, supra, 643 F. Supp. at 1512 (citations omitted).

Today, people must also be protected against arbitrary invasions of privacy conducted by their employer. The theoretical right of a dissenting employee to simply end an oppressive employment relationship is in deceptive:

> Recent analysis has pointed out the shortcomings of the mutuality theory. With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic. In addition, unchecked employer power, like unchecked employee power, has been seen to present a distinct threat to the public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its

> public policies carried out. (Citations omitted.)

Palmatter v. International Harvester Co., 85 Ill.2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876, 878 (1981).

Indiscriminate exercise of employer power can not be tolerated in a free society. The guarantees of personal dignity and security forming the backbone of our nation are worthless if they may be trampled upon by a powerful and self-serving few. Fourth Amendment analysis is particularly well-suited to balancing employer-employee interests in a private setting. When acting as an employer, the Federal government is virtually indistinguishable from any other employer. The threat of misuse of powers unique to government is virtually non-existent in an employment setting. This distinction is implicitly recognized by this Court's decision in National Treasury

Employees Union v. Von Raab, 489 U.S. 656, 109 S.Ct 1384, 103 L.Ed. 685 (1989). The Court applied a modified Fourth Amendment analysis to Customs Service drug-testing:

> Because the testing program adopted by the Customs Service is not designed to serve the ordinary needs of law enforcement, we have balanced the public interest in the Service's testing program against the privacy concerns implicated by the tests, without reference to our usual presumption in favor of the procedures specified in the Warrant Clause, to assess whether the tests required by Customs are reasonable.

Id. at ____, 109 S.Ct at 1397. Courts follow a similar approach in weighing privacy claims. For example, it is interesting to note that the conduct allowed by the Michigan Court of Appeals in Saldana, supra, closely follows the plain-view exception to the warrant requirement of the Fourth Amendment.

A balancing of the divergent interests of the employer in productivity and of the employee in privacy is necessary in the

private sector also. It is fundamentally unfair to allow the mass degradation of employees solely to appease the whim of their employer. An employer's concerns for safety and productivity are well guarded even with a requirement for testing based solely on individualized, reasonable suspicion. Eagle-Picher conjures up the image of a drug-stupefied workforce handling dangerous machinery and hot glue. Yet no showing of a drop in productivity is evident, nor of a rise in productivity after the testing. Significantly, although it is a problem of crisis proportions in our society, Respondent did not address the possibility of alcohol abuse in its testing program. If Eagle-Picher was truly concerned with identifying and eliminating any safety and production problems, a test for alcohol use would have been made. Mr. Aslanian himself admitted

using alcohol prior to coming to work. Not a single plant injury or mishap is documented in this case, much less one connected to a drug-using employee. Eagle-Picher simply has not sustained its claim of a drug epidemic interfering with plant operations.

Although individualized suspicion of drug use may allow an employer to order individual drug tests, in no event should an employer be permitted to conduct broad spectrum testing. Eagle-Picher had no right to submit its employees, absent individualized suspicion, to the degrading process of producing a sample of their urine. Nor did Respondent have a right to the plethora of personal information urinalysis provides. Balancing Eagle-Picher's interest in productive business relations against Appellant's right to personal privacy does not preclude the privacy interest. One's

legitimate expectations of privacy do not evaporate by the simple act of punching a time clock. Appellant's have therefore satisfied the second leg of their intrusion upon seclusion claim.

Offensiveness

The third element of Appellant's claim, that the intrusive conduct be offensive to a reasonable person, is present in abundance. Harkey v. Abate, supra, states that the objected to intrusion must be "highly offensive to a reasonable person." 131 Mich. App. at 182. The urinalysis process standing alone is sufficiently offensive to comport with this requirement; the bungled, cattle-driving method employed by Respondent to effectuate the test is particularly so. Capua v. City of Plainfield, supra, 643 F. Supp. at 1511 demonstrates the high level of

offensiveness involved in urine collection and analysis:

> The proposed test, in order to insure its reliability, requires the presence of another when the specimen is created and frequently reveals information about one's health unrelated to the use of drugs. If the tests are positive, it may affect one's employment status and even result in criminal prosecution.
>
> We would be appalled at the specter of the police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as if someone had been present and watching. It is George Orwell's "Big Brother" society come to life.
>
> To argue that it is the only practical means of discovering drug abuse is not sufficient. We do not permit a search of every house on a block merely because there is reason to believe that one contains evidence of criminal activity.
>
> (Emphasis in original.)

Respondent, concentrating solely on the process of collection in their argument to the trial court, apparently does not recognize that the suspicionless coercion of people to produce and deliver up their own urine is in itself repugnant to reasonable people. The process employed by Eagle-Picher compounded the disgrace to employees. Unlike the secluded atmosphere of a hospital, employees were lined up and herded to the restroom, for the stated purpose of producing a sample. The employees were being watched, and knew they were being overseen in this extremely private activity, unlike the normal use of a public restroom. Petitioners contend that watchful nurses "did not observe the void itself," yet there is employee evidence to the contrary. Several employees, unable to perform the function, were left waiting idly in the restroom. To compound

the humiliation, Eagle-Picher supervisory personnel repeatedly entered the restrooms to check on progress and hurry things along. The interruptions were so significant that the testing personnel lost track of their count. This is not the sort of activity that a reasonable person accepts.

Petitioners also contend that the process is sound because well over two-hundred people failed to complain about the testing. Reasonable offensiveness is not determined by Gallup percentages. Indicative of employee feelings is the letter to the editor of the Traverse City Record-Eagle penned by Lorraine B. Smith Adams:

> We were told to take the test or leave the plant, thus voluntarily quitting our jobs. Many employees actually did walk out. I, like many others, wanted to walk out the door and not participate in the test. But what could I do? If I left I would be accused of being a drug user and probably couldn't get another job anywhere. To most

> people, refusing to take the test means you are automatically guilty, even to a perspective (sic) employer. I work because I need a job to support my family; so I sacrificed my principles and took the test. I will keep my job but I have lost my dignity.

How many others kept their shame silent in order to protect their jobs?

The outrageousness of Eagle-Picher's urinalysis program satisfies the offensiveness requirement under Michigan law. Petitioners have therefore made out a prima facie case of intrusion upon seclusion invasion of privacy capable of surviving summary Judgment.

II

WRONGFUL DISCHARGE

The Sixth Circuit also mistakenly upheld Summary Judgment on Petitioners' wrongful discharge claim. Although blended together in Judge Bell's Opinion, the Court relied on two distinct theories in granting summary

judgment: 1) that disclaimers in employment applications and employee handbooks created an employment-at-will relationship; and 2) Eagle-Picher substantially complied with the policies set forth in its handbook. The Trial Court's reliance on these theories was misplaced.

Michigan has been a leader in recognizing employee contract rights. In Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980), the Michigan Supreme Court held that employer statements and policies can create termination-for-cause employment in what would traditionally have been employment-at-will situations. The Michigan Supreme Court stated:

> ...that employer statements of policy...can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual

> rights in the employee, and, hence, although the policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy statement in pre-employment interviews and the employee does not learn of its existence until after his hiring.

Id. at 614-15. The Court recognized that an employee may form legitimate expectations based on the employer's policy statements, such becoming part of the employment agreement. Id. at 598.

Thus, although an employer is not obligated to codify a disciplinary policy, once he does so the policy is binding:

> While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace

> of mind associated with the job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. (Emphasis supplied.)

Id. at 613.

Through its employee handbook, Eagle-Picher created just the sort of employment environment contemplated by Toussaint. The Petitioners and other employees were therefore vested with the contractual rights to fair treatment and progressive discipline outlined in the handbook. This Court should be aware that two handbooks are involved in

this case. The Respondent blurred the distinction below by quoting interchangeably from the two manuals. The first handbook, promulgated when the Kalkaska plant was known as Fabricon Automotive (but was owned by Respondent Eagle-Picher), remained in effect until August, 1989.

Statements of policy made in the Fabricon Handbook at the very least create a jury question as to the nature of the employment relationship created by the handbook. The Fabricon manual comprehensively lists work policies, such as attendance, seniority, job bids, overtime, transfers, discipline, safety, housekeeping and facilities usage. These policies help secure an "orderly, cooperative and loyal workforce." Toussaint at 613. To gain employee adherence to the rules, the handbook repeatedly refers to the value the company

places on its employees and asserts that employees will be treated fairly. For example:

"You are now an important and responsible part of Fabricon's workforce"; "A good relationship between the employees and management here at Fabricon is something that is very important to the future of our company. Everyone knows that a good working relationship must be present for any company to operate efficiently and successfully"; and "A good attendance record is a very valuable asset. It is important both for the company and the employee." (Emphasis supplied.) The import of these statements is to gain employee cooperation by instilling a belief in the sincerity and faithfulness of the company. Provisions of the Fabricon Handbook, are calculated to gain employee loyalty and performance for the company's

gain. Toussaint requires that Eagle-Picher reciprocate by following its announced policies.

The Fabricon Handbook is a more than sufficient base for a jury to find the existence of a Toussaint contract. Eagle-Picher, in distributing the handbook, created a relationship "instinct with obligation." Toussaint at 613. Nowhere in the Fabricon Handbook does Eagle-Picher retain the right to terminate at will. The existence of a just-cause contract predicated on an employee handbook is a question of fact for the jury. Renny v. Port Huron Hospital, 427 Mich 415, 417, 398 N.W.2d 297 (1986). The tenor of the entire handbook is that employees would be fairly and justly treated. A genuine question of fact exists as to Eagle-Picher's compliance with its handbook obligations,

rendering summary judgment of Petitioners' Toussaint claim improper.

Employment applications signed by each of the Petitioners contain a provision by which Eagle-Picher purports to retain the right to discharge employees without cause. The application disclaimers do not vitiate the existence of a Toussaint contract under Michigan law, however. The District Court and Sixth Circuit relied on the application disclaimer and the decision in Reid v. Sears, Roebuck and Co., 790 F.2d 453 (6th Cir. 1986) in determining that Petitioners were employees-at-will. The Court's conclusion to grant summary judgment is invalid as the effect of disclaimers is a jury question under Michigan law.

In Butzer v. Camelot Hall Convalescent Centre, Inc., 183 Mich. App. 194, 454 N.W.2d 122 (1989), the Michigan Court of Appeals

considered the case of a nurse who was allegedly discharged for failing to recognize and report a patient's symptoms. The nurse had, in fact, correctly diagnosed the patient and informed the treating physician of her opinion. The plaintiff had signed an employment application containing a disclaimer similar to those in the case at bar, and the employer had issued an employment manual with a progressive disciplinary system of three warnings, similar to the discipline procedure in the pending case. The Court of Appeals considered and agreed with the Reid Court's conclusion that the at-will provision became part of the employment contract. Butzer at 200. The Butzer Court, however, found that the employer's subsequent distribution of a handbook created a question of fact as to the

existence of a Toussaint contract. Butzer at 201.

Other panels of the Michigan Court of Appeals have come to a similar conclusion. In Dalton v. Herbruck Egg Sales Corp., 164 Mich. App. 543, 417 N.W.2d 496 (1987), the Court held that an employee handbook listing a graduated disciplinary system, yet expressly providing for at-will employment, created a question of fact to be resolved by the jury. Id. at 547. Dalton was cited as authority for the proposition that "...a jury question exists when an employer's stated termination policies contain expressions of both at-will and just-cause employment." Langeland v. Bronson Methodist Hospital, 178 Mich. App. 612, 615, 444 N.W.2d 146 (1989), lv. app. den. 433 Mich. 915 (1989).

Summary judgment in the present case was improper on the ground that the application

disclaimer provided for at-will employment only. At best, a jury question is raised on this issue. Eagle-Picher cannot, consistent with Toussaint, obtain the benefits of an "orderly, cooperative and loyal" work force through illusory promises of fair and just treatment.

Because employees were not given proper notice of handbook revisions, neither the Eagle-Picher Handbook, nor the "Drug Free Workplace Policy" of July, 1989 were proper grounds for terminating the Petitioners' employment. In In re Certified Question, Bankey v. Storer Broadcasting Co., 432 Mich. 438, 443 N.W.2d 112 (1989), the Michigan Supreme Court considered the question of whether an employer could unilaterally change policies set out in an employee manual. While holding that an employer may amend its policies, the Court cautioned:

> The principles on which Toussaint is based would be undermined if an employer could benefit from the good will generated by a discharge-for-cause policy while unfairly manipulating the way in which it is revoked. Fairness suggests that a discharge-for-cause policy announced with flourishes and fanfare at noonday should not be revoked by a pennywhistle trill at midnight. We hold that for the revocation of a discharge for cause policy to become legally effective, reasonable notice of the change must be uniformly given to affected employees. (Emphasis supplied.)

Certified Question, at 457. Eagle-Picher failed to give reasonable notice of the change in policies to its employees, therefore termination under the new policy was unlawful. Eagle-Picher posted its "Drug Free Workplace Policy" on an employee bulletin board on July 17, 1989 -- roughly two weeks prior to the commencement of drug testing.

The foregoing analysis applies equally to those employees terminated for "failing"

urinalysis and those individuals discharged for refusing to give samples. Eagle-Picher claims that the latter employees were not fired at all, but voluntarily quit. This esoteric distinction does not shield Respondent from liability for its wrongful action. The doctrine of constructive discharge has evolved to protect employees from employer conduct calculated to induce resignation. When an employer "...deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." LeGalley v. Bronson Community Schools, 127 Mich. App. 482, 486, 339 N.W.2d 223 (1983). Finding a constructive discharge depends on the facts of each case, requiring inquiry into the intent of the employer and the impact on the employee. The employer is held to the reasonably foreseeable consequences of

his conduct. Jenkins v. Southeastern Michigan Chapter, American Red Cross, 141 Mich. App. 785, 796, 369 N.W.2d 223 (1985).

On the day of the drug testing, employees were given the Hobson's choice of accepting the degradation of producing and having inspected a sample of their urine, or leaving the plant and being considered a "voluntary" quit. To many employees, the specter of unemployment loomed larger than the affront to their dignity. A few employees, however, balked at the totalitarian actions of Eagle-Picher, knowing their jobs would be lost. Respondent must have realized that employees would value their privacy to the extent of feeling compelled to leave. Indeed, Eagle-Picher wields the stick of loss of employment to enforce the giving of urine samples, its intent to cause resignations being evident.

Therefore, those Petitioners refusing to offer urine samples have also been constructively discharged in violation of their employment contract.

III

DEFAMATION

Statements made by Division President Michael Aslanian for publication in local news media were defamatory, as the District Court so found. Eagle-Picher is liable for the defamatory statements of its officer, made in the exercise of his corporate duties. See Polenda v. Bendix Aviation Corp., 360 Mich. 129, 139-140, 103 N.W.2d 78 (1960).

Mr. Aslanian's portrayal of all Petitioners as drug users, regardless of their having submitted to urinalysis, is defamatory to each individual Appellant, even though not mentioned by name. The burden of pleading and proof is sustained under the

doctrine of "colloquium." Defamatory words directed to a group are actionable by individual group members upon a showing of membership in the class defamed and reasonable application of the words to the individual. Hodgins Kennels, Inc. v. Durbin, 170 Mich. App. 474, 480-81, 429 N.W.2d 189 (1988). In discussing the doctrine, Dean Prosser notes that:

> The largest group to which the possibility of recovery has been recognized under the common law consisted of the 'sixty or seventy' members of the University of Oklahoma football team, in Fawcett Publications, Inc. v. Morris, (Okl. 1962), 377 P.2d 42, where, however, there appears to have been a direct accusation that all of the team took drugs.

W. Prosser, Handbook of the Law of Torts, 4th ed., p. 750n.69. In the present action, Eagle-Picher is liable to each Appellant for the defamatory remarks of Mr. Aslanian.

Mr. Aslanian's characterization of Petitioners as excessive and frequent drug users unable to do their jobs is defamatory. "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Iacco v. Bohannon, 70 Mich. App. 463, 466, 245 N.W.2d 791 (1976) (citing 3 Restatement of Torts, Section 559, p. 140). Accusation of the commission of a crime is defamatory per se under Michigan law, Wilkerson v. Carlo, 101 Mich. App. 629, 632, 300 N.W.2d 658 (1980), as are words injurious to a person in his or her profession or employment. Swenson-Davis v. Martel, 135 Mich. App. 632, 636, 354 N.W.2d 288 (1984), lv. app. den. 419 Mich. 946 (1984). Mr. Aslanian directly accused Petitioners of violating Michigan criminal

law, as well as being unable to do their jobs. The Trial Judge correctly found that such remarks are defamatory.

Judge Bell mistakenly held Mr. Aslanian's remarks to be qualifiedly privileged, thereby allowing Respondent to escape the consequences of its conduct. In Bostetter v. Kirsch Co., 319 Mich. 547, 30 N.W.2d 276 (1948), the Michigan Supreme Court defined a qualified privilege to defame as:

> A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without the privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation.

Id. at 558 (quoting 17 R.C.L. p. 341 and 33 Am Jur. p. 124). The fact of Petitioners' termination from employment and the

circumstances surrounding the discharge were not of public concern. Rather, Mr. Aslanian used the occasion to gain increased public exposure of his firm. Mr. Aslanian had no duty, legal or moral, to expound upon the circumstances of Petitioners' firings to the media. Similarly, neither the media, nor the public, had an interest in the firings. Accordingly, Respondent is not protected by privilege.

Even should Mr. Aslanian's statements be privileged, the privilege is not absolute. It is for the jury to determine if a privilege has been abused. Lawrence v. Fox, 357 Mich. 134, 144, 97 N.W.2d 719 (1959). Traditionally, the privilege could be overcome upon a showing of malice. Bostetter at 559. Common law malice exists where a statement is made with knowledge of its falsity or with reckless disregard for its

truth or falsity. Swenson-Davis, supra, 135 Mich. App. at 637. Recent Michigan Supreme Court precedent indicates that the common law malice rule has been replaced by a negligence standard. Rouch v. Enquirer & News of Battle Creek, 427 Mich. 157, 398 N.W.2d 245 (1986).

The Rouch Court considered a defense of privilege raised by a newspaper defendant against a private plaintiff regarding the publication of police statements concerning plaintiff's arrest. The Court reviewed the case in light of Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), in which this Court held:

> [S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Rouch at 181 (quoting Screc..ng, 418 U.S. at 347). The Rouch Court defined the issue before it as:

> Should there be a qualified public interest privilege applicable in cases involving non-public plaintiffs that is more protective than the constitutional minimum requirements now in place for publications involving both private and public persons?

Rouch at 187. The Court answered its query negatively, holding that a negligence standard applies. Id. at 187.

Although Rouch involved the statements of a newspaper, rather than the republished statements of an individual, its reasoning applies in the situation being considered by this Court. Mr. Aslanian made his statements to reporters with the certain knowledge that they would be published. In Michigan, the publisher of a defamatory statement is liable for the injurious consequences of repetition where the repetition is the natural and

probable result of the original publication. Tumbarella v The Kroger Co., 85 Mich. App. 482, 496, 271 N.W.2d 284 (1978). Mr. Aslanian was therefore in substantially the same position as the newspaper defendant in Rouch. The privilege claimed by Eagle-Picher is nearly identical to that raised by the Rouch defendant: that the issue was one "of. legitimate public concern." The negligence standard enunciated in Rouch is therefore applicable to the present case.

Under either a negligence or common-law malice standard, Mr. Aslanian's statements constitute an abuse of the privilege claimed, entitling Petitioners to recover for the defamation. Mr. Aslanian's statements are painted with a broad brush, directly accusing Petitioners of drug use. Mr. Aslanian did not distinguish between employees refusing to take the test and those "failing" urinalysis.

Indeed, Mr. Aslanian indicated that those who left the plant did so out of fear of being identified as drug users. For example, The Leader and The Kalkaskian reported on Thursday, August 24, 1989:

> Some employees gave up their jobs rather than be tested. Aslanian said he told the employees just before the testing began, 'If you know you are an illegal drug user and feel you are going to be caught you have the option to leave the plant in a few moments and we will accept that as a voluntary quit.'

Mr. Aslanian's statements accusing those who left the plant of illegal drug use, exhibit a reckless disregard for the truth, and certainly satisfy a negligence standard.

Mr. Aslanian's insinuation that Petitioners are unfit workers also exceeds the scope of any privilege. The pending case is similar to the situation found in Croton v. Gillis, 104 Mich. App. 104, 304 N.W.2d 820 (1981). In Croton, a sheriff made a

statement to newspaper reporters about the dismissal of a deputy. The sheriff commented that the firing was due to the deputy's attitude and inability to work with fellow officers, even though the deputy was a good police officer and did not fail in the performance of his duties. Id. at 107. The Court held, under the common-law malice standard, that the sheriff may not be protected by a qualified privilege making summary disposition improper. The case was remanded for a jury determination of malice. Id. at 110-111.

As in Croton, the "natural and proximate consequence" of Mr. Aslanian's statements is to deter others from employing Petitioners. Id. at 109. Mr. Aslanian made sweeping allegations of drug use undermining safety and productivity at the Kalkaska plant. No attempt is made to document the perceived

loss in productivity or any accident, much less determine and verify the cause. If such exist, a multitude of reasons may explain them, such as alcohol use. But Mr. Aslanian's fixation on illegal drugs prevents a rational approach to the problems. Respondent has not shown that the Petitioners lie behind a drop in productivity or have caused a single plant mishap. Even if any of the Petitioners have used illegal drugs, no evidence exists that they could not perform their jobs. Accordingly, any privilege to defame that may exist has been abused, entitling Petitioners to relief.

CONCLUSION

This case presents profound privacy and employment issues of great importance nationwide. The decision of the Sixth Circuit materially differs from the

conclusion of the Third Circuit in Borse, applying remarkably similar facts and law. The decision also detrimentally alters Michigan law. This Court should grant certiorari to review the decision of the Sixth Circuit.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray that this Court grant a writ of certiorari and hear Petitioners' appeal of the decision of the Sixth Circuit Court of Appeals.

DATED: May 22, 1992

Respectfully submitted,

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App. 1

No. 90-1949

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

RALPH BAGGS; VERN BAGGS, JR.; GARY A. DELECKI; LORI J. GLICK; MERRILL J. HANSEN; TRACY HELSEL; ROBERT KANAZIZ; ANTHONY F. KROL; PENNY J. PAHL; GARY PARKER; GARY ROESSLER; MARK RUSSELL; DAVID WILSON; MARY ANN FENDER; WALTER MONTNEY; PATRICIA RUSSELL; DANIEL SCHELSKE; NADINE WELLS; JAMES D. WILSON, II; JAMES MacDONALD,

Plaintiffs-Appellants,

THOMAS A. BROWN; BILL ELYA, III; GARRY MOORE; TIMOTHY MORRISON; DEANE W. PAHL;

Plaintiffs,

v.

EAGLE-PICHER INDUSTRIES, INC., an Ohio corporation,

Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed February 27, 1992

Before: GUY, NORRIS, and BATCHELDER, Circuit Judges

RALPH B. GUY, JR., Circuit Judge. The plaintiffs in this private-sector employee drug testing case appeal the district court's grant of summary judgment dismissing their breach of contract, defamation, and invasion of privacy claims against their former employer. We affirm.

I.

Until August 1989, the plaintiffs worked for the defendant, Eagle-Picher Industries, Inc., at Eagle-Picher's Trim Division plant in Kalkaska, Michigan. The Trim Division manufactures interior trim for use in automobiles. Some of the plant's 230

employees work with potentially hazardous materials, including hot adhesives.

Each applicant for employment at the plant was required to sign a form acknowledging that Eagle-Picher could terminate the employment at any time, with or without notice.[1] Upon hiring, each new worker received an employee handbook. The version of the handbook given to the plaintiffs had been prepared when the plant was known as Fabricon Automotive Division. The Fabricon handbook contained a pledge by Eagle-Picher to treat employees fairly, followed by a list of ten rules of employee conduct. The first rule prohibited

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[1] Eagle-Picher used three versions of its application forms, each containing slightly different language. All three versions, however, provided for termination without cause or notice.

intoxication while on duty and use or possession of drugs on company premises. The handbook also spelled out a four-step system of progressive discipline but noted that severe infractions would result in immediate discharge.

In late 1988, Trim Division President Michael Aslanian became concerned about drug use among employees. According to Aslanian, several employees complained to him about drug use by fellow workers. Aslanian also stated that truck drivers making deliveries to the plant had commented to management about employee drug use. The plant's management responded in April 1989 by promulgating a drug-free workplace policy. That policy prohibited employees from possessing, using, or being under the influence of drugs while at work. The policy also provided for drug testing of employees

under certain circumstances. The new policy was posted on employee bulletin boards.

Aslanian also communicated his concerns to the Kalkaska County Sheriff and the Grand Traverse Narcotics Team. With Aslanian's encouragement, an undercover agent worked in the plant to observe employees. As a result of the agent's surveillance, two employees were arrested in June 1989 for selling drugs. In order to dramatize the situation, Aslanian allowed the police to arrest the employees at work. According to Aslanian, the undercover agent told him that 60 percent of the workforce used illegal drugs.

The Trim Division strengthened its drug policy in July 1989. Among other changes, the new policy provided that "reporting to work with alcohol, illegal or illicit drugs in the employee's system is a violation of Company rules and will result in disciplinary

action, up to and including discharge." This revision strengthened the earlier provision that only prohibited an employee from working under the influence of drugs. The new policy also provided that submission to a drug test at management's request was a "condition of employment." The previous policy had provided for drug testing only in certain circumstances. The new policy was posted on employee bulletin boards on July 17, 1989. On August 7, 1989, Eagle-Picher distributed a new employee handbook containing the revised drug policy.

Eagle-Picher carried out a surprise drug screening on August 10 and 11, 1989. At a meeting of employees, Aslanian announced that each employee would be required to submit a urine sample as a condition of continued employment. Nine employees, including seven of the plaintiffs, refused the test and left

the plant. Eagle-Picher treated the refusals as voluntary resignations. One of the plaintiffs refused the test but declined to leave the plant. Eagle-Picher terminated his employment.

The remaining employees, over 200 in number, submitted to the urine test. The employees filled specimen jars in the employee lavatories. Male employees used a urinal in the presence of a male nurse. Female employees used a stall while a female nurse stood outside. Employees absent on August 10 were tested at a local health clinic.

Eagle-Picher received the test results six days later. Eagle-Picher immediately terminated the employees who tested positive for drugs, including twelve of the plaintiffs. On each terminated employee's record, Eagle-Picher listed violation of an

unspecified company policy as the reason for termination.

One of the plaintiffs who tested positive denied drug use and contended that his positive result stemmed from passive inhalation of marijuana smoke. The other plaintiffs who tested positive have admitted that they have used illegal drugs. Eight of the ten plaintiffs who refused to submit to the test have also admitted illegal drug use. The other two plaintiffs who declined to be tested have denied any illegal drug use.

In response to requests from the media, Aslanian commented on the testing program. In published remarks, Aslanian stated that some employees had refused to take the tests and that others had tested positive. Aslanian also made statements about the severity of the drug problem at the plant.

Aslanian did not refer to any employee by name.

The plaintiffs filed this action in Kalkaska County Circuit Court shortly after their terminations. The complaint contained six counts: (1) breach of employment contract; (2) defamation; (3) invasion of privacy; (4) misrepresentation; (5) negligence; and (6) violation of Michigan's Handicappers Civil Rights Act, Mich. Comp. Laws Ann. §37.1101, et. seq. Eagle-Picher, an Ohio corporation, removed the case to federal district court.

After discovery, the district court granted Eagle-Picher's motion for summary judgment. Baggs v. Eagle-Picher Indus., Inc., 750 F. Supp. 264 (W.D. Mich. 1990). The court first held that the plaintiffs were employees at will and had no contractual right to progressive discipline. The court

next held that Aslanian's comments to the media were protected by a qualified privilege. Third, the court dismissed the invasion of privacy claim, holding that the plaintiffs lacked an expectation of privacy and that Eagle-Picher had not disclosed any private facts to the public. The court dismissed the misrepresentation count, holding that the plaintiffs' claim involved only future promises, not false statements of fact. Fifth, the court dismissed the negligence count on the ground that Eagle-Picher's duties were contained in the contract. Finally, the court dismissed the Handicappers' Act claim, holding that the plaintiffs failed to allege the nature of their handicap.

This appeal followed. On appeal, the plaintiffs challenge the district court's grant of summary judgment against the breach

of contract, defamation, and invasion of privacy claims. They apparently have abandoned the remaining counts.

II.

We review grants of summary judgment de novo. EEOC v. University of Detroit, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is appropriately granted when the pleadings, affidavits, and other submissions demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

A.

The plaintiffs first argue that there is a genuine issue of material fact as to whether Eagle-Picher breached the plaintiffs' employment contracts. Specifically, the plaintiffs contend that there is an issue of fact as to whether the employee handbook

created a contract right to progressive discipline and fair treatment. We disagree.

The plaintiffs concede that the language on their employment applications created at will employment. However, the plaintiffs maintain that the handbook, by expressly providing for fair treatment and a progressive discipline system, altered the employment relationship. The plaintiffs' argument relies heavily on language from the landmark case of Toussaint v. Blue Cross & Blue Shield of Michigan, 40ε Mich. 579, 292 N.W.2d 880 (1980). In Toussaint, the Michigan Supreme Court held that an employer's statements, including those contained in employee handbooks, could convert a presumptive at will employment relationship into a contract terminable only for cause. Id., 292 N.W.2d at 891-92.

The contours of the rights established in Toussaint have been heavily litigated, and the Michigan Supreme Court has revisited the issue repeatedly. In Renny v. Port Huron Hospital, 427 Mich. 415, 398 N.W.2d 327 (1986), the court stated that employers retain the right to require applicants to acknowledge that they will serve as at will employees. Id., 398 N.W.2d at 334. Three years later, the court held that an employer could, with adequate notice, reestablish an at will relationship by unilaterally revising the written policy statements that had created a just cause employment contract. In re Certified Question, 432 Mich. 438, 443 N.W.2d 112, 121 (1989).

Most recently, the court explained the scope of Toussaint in Rowe v. Montgomery Ward & Co., 437 Mich. 627, 473 N.W.2d 268 (1991). In Rowe, the plaintiff received several

employee handbooks containing disciplinary procedures. The court held, however, that there was no jury question as to whether the handbooks created a just cause contract because the most recent handbook stated that the employment relationship was at will. Id., 473 N.W.2d at 277. The court distinguished the employee handbooks distributed in Toussaint, noting that those handbooks expressly stated that employees would be terminated only for just cause. Id. at 276.

We hold that the plaintiffs had no contractual right to progressive discipline. The language of the employee handbook does not state that progressive discipline will be used in all cases. On the contrary, the handbook expressly provides that the "steps may not always be followed. It depends on how serious or negligent the initial offense

is. If a serious offense takes place, discharge may result without any of the other warnings taking place." (Emphasis added). In a series of actions beginning in April 1989, Eagle-Picher made it abundantly clear that it regarded any violation of the drug policy as a serious offense. Therefore, we find that there is no question for the jury as to whether the plaintiffs were entitled to progressive discipline before termination.

We also hold that the employee handbook did not create a jury question as to whether the plaintiffs could be discharged only for cause. Unlike the handbooks at issue in Toussaint, Eagle-Picher's handbook never expressly stated that employees would be discharged only for cause. The handbook contained a list of rules, but never suggested than an employee could be discharged only for violating these rules.

When faced with an identical claim based on a list of rules distributed to employees, the Michigan Supreme Court held:

> Nothing in the rules suggested that the enumerated conduct was the only basis for dismissal, and the rules were consistent with a termination-at-will policy. Thus, we find no evidence from which a reasonable promisee could find a promise of job security. Consequently, we find no evidence from which reasonable minds could find that there was mutual assent on a term of employment terminable only for cause.

Rowe, 473 N.W.2d at 275. We likewise find that the handbook does not create a jury question as to whether the plaintiffs could be terminated only for cause.

Finally, even if the handbook had created a just cause contract, the plaintiffs' violation of the drug-free workplace policy would constitute cause under the rules laid down in the handbook. The handbook expressly barred drug use on the

job. In July 1989, Eagle-Picher toughened the policy to prohibit an employee from reporting to work with drugs in his or her system and to require submission to testing. Although Eagle-Picher had not include (sic) this new policy in a revised handbook until three days before the surprise screening, the plaintiffs had adequate notice, as the policy had been prominently posted for nearly a month. Since Eagle-Picher clearly regarded violations of its drug policy as serious offenses, the provision in the handbook for discharge without warning applied. Therefore, we find that the plaintiffs could have been discharged even if the handbook had created a just cause employment contract. Accordingly, we affirm the district court's grant of summary judgment against the plaintiffs' breach of contract claim.

B.

The plaintiffs next argue that the district court erred by granting summary judgment against the defamation count. We affirm, finding no genuine issue as to whether Aslanian's remarks to the media defamed any of the plaintiffs.

The plaintiffs' defamation claim is based on one statement by Aslanian that appeared in a local newspaper:

> Some employees gave up their jobs rather than be tested. Aslanian said he told the employees just before the testing began, "If you know you are an illegal drug user and feel you are going to be caught you have the option to leave the plant in a few moments and we will accept that as a voluntary quit."

The Leader and the Kalkaskian, August 24, 1989, at 15. Aslanian did not identify any of the plaintiffs by name. The plaintiffs argue that this statement implies that those who refused the test were illegal drug users.

A statement is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Nuyen v. Slater, 372 Mich. 654, 127 N.W.2d 369, 374 n.* (1964). An accusation of a commission of a crime is defamatory per se. Wilkerson v. Carlo, 101 Mich. App. 629, 300 N.W.2d 658, 659 (1980).

The district court found that Aslanian's remarks "could be considered defamatory to plaintiffs as a group," but held that the remarks were protected by a qualified privilege. Baggs, 750 F. Supp. at 270. Although we have reservations as to whether Aslanian enjoyed a qualified privilege, we affirm the summary judgment on the alternative ground that the statements are not defamatory.

We begin our analysis of Aslanian's remarks by noting that he did not state that all those refusing the test were drug users. Instead, the statement points out that employees were told they could refuse the test. The statement does not exclude the possibility that some employees refused the test for reasons other than fear of being caught. It is the plaintiffs who have supplied the missing implication: that all those refusing the test were illegal drug users. While we agree that some people might assume that anyone refusing a drug test must have something to hide, we fail to see how Aslanian's published comments added to this possible misconception.

"Where the words are, as a matter of law, not capable of carrying a defamatory meaning, summary judgment...is appropriate." Sawabini v. Desenberg, 143 Mich. App. 373,

372 N.W.2d 559, 563 (1985). Since we find that Aslanian's comments could not be reasonably read to state that those refusing the test were illegal drug users, we affirm the grant of summary judgment against the plaintiffs' defamation claim.

Finally, we note that even if Aslanian had stated that all of the plaintiffs who refused the test used illegal drugs, most of them still could not recover. Of the ten plaintiffs who refused to submit to testing, eight have admitted to using illegal drugs. Since truth is a complete defense to an action for defamation, those eight plaintiffs could not prevail. See Cochrane v. Wittbold, 359 Mich. 402, 102 N.W.2d 459, 463 (1960).

C.

The plaintiffs next argue that the district court erred in granting summary

judgment against their invasion of privacy claim. We disagree.

Michigan law has long recognized a common-law right to privacy. See De May v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881) (affirming judgment against physician who allowed young male companion to watch plaintiff give birth). Michigan courts recognize four distinct common-law privacy torts: (1) intrusion into a person's seclusion, solitude, or private affairs; (2) public disclosure of embarrassing private facts about a person; (3) publicity that portrays a person in a false light; and (4) appropriation for gain of a person's image or likeness. Lewis v. Dayton-Hudson, 128 Mich. App. 165, 339 N.W.2d 857, 858 (1983); Beaumont v. Brown, 401 Mich. 80, 257 N.W.2d 522, 527 n.10 (1977).

The plaintiffs allege that Eagle-Picher's conduct constituted intrusion into the plaintiffs' seclusion. To prevail on this claim, the plaintiffs "must show that there was: (1) an intrusion by defendant; (2) into a matter which plaintiff[s] [have] a right to keep private; (3) by the use of a method which is objectionable to the reasonable person." Lewis, 339 N.W.2d at 859 (citing Earp v. City of Detroit, 16 Mich. App. 271, 167 N.W.2d 841, 845 (1969)).

The Michigan courts have not decided whether drug testing of private-sector employees amounts to a tortious invasion of privacy. Therefore, we must examine privacy cases involving other intrusions in order to decide whether the plaintiffs' allegations

would survive summary judgment in a Michigan court.[2]

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[2] Although employee drug testing has been heavily litigated, most cases have not involved the common-law privacy tort. Drug testing of public-sector employees invokes the Fourth Amendment. See, e.g., National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Penny v. Kennedy, 915 F.2d 1065 (6th Cir. 1990). Other cases have turned on privacy provisions in state constitutions, e.g., Luck v. Southern Pac. Transp. Co., 218 Cal. App. 3d 1, 267 Cal. Rptr. 618, cert. denied, __U.S. __, 111 S. Ct. 344 (1990), or state public policy, e.g., Twigg v. Hercules Corp., 406 S.E.2d 52 (W. Va. 1990). Since the plaintiffs in this case were private-sector employees, they cannot invoke the

Workplace urine testing represents an intrusion that a reasonable person might find objectionable. In a case challenging federal regulations requiring urinalysis of certain

---

Fourth Amendment or the privacy provision of the Michigan Constitution. The plaintiffs do not advance a public policy claim on appeal. The state courts that have considered common-law privacy challenges to employee drug testing have upheld the testing programs. Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1137-38 (Alaska 1989); Jennings v. Minco Technology Labs, Inc., 765 S.W.2d 497, 502 (Tex. Ct. App. 1989); Texas Employment Comm'n v. Hughes Drilling Fluids, Inc., 746 S.W.2d 796, 801-02 (Tex. Ct. App. 1988).

railway workers, the United States Supreme Court stated:

> [C]hemical analysis of urine...can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the same to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated:
>
> > "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (1987).
>
> Because it is clear that the collection and testing of urine intrudes upon expectations of

> privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617 (1989) (footnote omitted). The Court upheld the challenged regulation, however, finding that mandatory urinalysis of workers in certain circumstances is not unreasonable. Id. at 634.

The Michigan Court of Appeals has held that a plaintiff may recover for an intrusion into his or her solitude when performing eliminatory functions. Harkey v. Abate, 131 Mich. App. 177, 346 N.W.2d 74 (1983). In Harkey, the court reversed a grant of summary judgment to the owner of a roller-skating rink who had installed see-through panels in a restroom, finding that this type of

intrusion was highly offensive to a reasonable person. Id., 346 N.W.2d at 76.

Although mandatory workplace urine testing may well be an intrusion that a reasonable person would find objectionable, our inquiry does not end there. The plaintiffs also must show that Eagle-Picher intruded into a matter that the plaintiffs had a right to keep private.

The Michigan Court of Appeals has twice held that the relationship between the parties affects the right of a plaintiff to keep certain matters private. In Earp, the court stated that the right of privacy "does not extend so far as to subvert those rights which spring from social conditions, including business relations..." Id., 167 N.W.2d at 845 (citing 77 C.J.S. Right of Privacy §3 at 401). The court affirmed summary judgment in favor of an employer who

had obtained a copy of a confidential police report of an interview with an employee. The court held that the employee had no privacy right to keep the employer from obtaining the report because the interview concerned company business and because the employee had told the employer about the interview. Id. at 848.

More recently, the Michigan Court of Appeals affirmed a summary judgment for an employer who had undertaken extensive surveillance of an injured employee's home to determine if he was malingering. Saldana v. Kelsey-Hayes Co., 178 Mich. App. 230, 443 N.W.2d 382 (1989). The court conceded that the employer's use of a high-powered lens to observe the interior of the employee's home could be objectionable to a reasonable person. Id., 443 N.W.2d at 384. The court found, however, that the intrusion was not

into a matter the employee had a right to keep private because the employer had a right to investigate the extent of the employee's disability. Id.

Saldana and Earp compel us to conclude that Eagle-Picher's conduct did not invade a matter that the plaintiffs had a right to keep private under Michigan law. Both of those cases stand for the proposition that a Michigan employer may use intrusive and even objectionable means to obtain employment-related information about an employee. There is no dispute that the information Eagle-Picher sought, whether employees were reporting to work with drugs in their systems, was related to the plaintiffs' employment. Therefore, even accepting the plaintiffs' contention that Eagle-Picher's urine testing program may have been intrusive

and objectionable to a reasonable person, summary judgment is still appropriate.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No: 90-1949

RALPH BAGGS; VERN BAGGS, JR.; GARY A. DELECKI; LORI J. GLICK; MERRILL J. HANSEN; TRACY HELSEL; ROBERT KANAZIZ; ANTHONY F. KROL; PENNY J. PAHL; GARY PARKER; GARY ROESSLER; MARK RUSSELL; DAVID WILSON; MARY ANN FENDER; WALTER MONTNEY; PATRICIA RUSSELL; DANIEL SCHELSKE; NADINE WELLS; JAMES D. WILSON, II; JAMES MacDONALD,

Plaintiffs-Appellants,

THOMAS A. BROWN; BILL ELYA, III; GARRY MOORE; TIMOTHY MORRISON; DEANE W. PAHL; MARK BIRGY; DANIEL CUMMER; BARBARA SCHIRRIPA; MICHAEL MOORING,

Plaintiffs,

v.

EAGLE-PICHER INDUSTRIES, INC., an Ohio corporation,

Defendant-Appellee.

Before: Guy, Norris, and
Batchelder, Circuit Judges

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

Issued as Mandate: 3-20-92

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SIXTH CIRCUIT

RALPH BAGGS, VERN BAGGS, JR., THOMAS A. BROWN, GARY A. DELECKI, BILL ELYA III, LORI J. GLICK, MERRILL J. HANSEN, TRACY HELSEL, ROBERT KANAZIZ, ANTHONY F. KROL, GARRY MOORE, TIMOTHY MORRISON, DEANE W. PAHL, PENNY J. PAHL, GARY PARKER, GARY ROESSLER, MARK RUSSELL, DAVID WILSON, MARK BIRGY, DANIEL CUMMER, MARY ANN FENDER, WALTER MONTNEY, MICHAEL MOORING, PATRICIA RUSSELL, DANIEL SCHELSKE, BARBARA SCHIRRIPA, NADINE WELLS, JAMES D. WILSON, II, JAMES MacDONALD, and persons similarly situated,

Plaintiffs,

File No: G89-50911 CA
HON. ROBERT HOLMES BELL

v.

EAGLE-PICHER INDUSTRIES, INC., an Ohio corporation,

Defendant.

_____/

ORDER OF THE COURT

In accordance with the Court's written opinion dated July 30, 1990,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted;

IT IS FURTHER ORDERED that plaintiffs' third amended complaint is dismissed.

IT IS SO ORDERED.

Dated: July 30, 1990

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SIXTH CIRCUIT

RALPH BAGGS, VERN BAGGS, JR., THOMAS A. BROWN, GARY A. DELECKI, BILL ELYA III, LORI J. GLICK, MERRILL J. HANSEN, TRACY HELSEL, ROBERT KANAZIZ, ANTHONY F. KROL, GARRY MOORE, TIMOTHY MORRISON, DEANE W. PAHL, PENNY J. PAHL, GARY PARKER, GARY ROESSLER, MARK RUSSELL, DAVID WILSON, MARK BIRGY, DANIEL CUMMER, MARY ANN FENDER, WALTER MONTNEY, MICHAEL MOORING, PATRICIA RUSSELL, DANIEL SCHELSKE, BARBARA SCHIRRIPA, NADINE WELLS, JAMES D. WILSON, II, JAMES MacDONALD, and persons similarly situated,

Plaintiffs,

File No: G89-50911 CA
HON. ROBERT HOLMES BELL

v.

EAGLE-PICHER INDUSTRIES, INC., an Ohio corporation,

Defendant.

_____/

OPINION OF THE COURT

Now before the Court is defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(c)(Rule 56) as to Counts I, II, IV, VI and portions of Count III of

plaintiff's third amended complaint. Also before the Court is defendant's motion for dismissal pursuant to Fed. R. Civ. P. 12(b)(6)[Rule 12(b)(6)] as to the remainder of Count III and all of Count V of plaintiffs' third amended complaint.

BACKGROUND

This case arises out of surprise drug test conducted by defendant in August 1989. Defendant is an Ohio corporation with a division located in Kalkaska, Michigan. The Kalkaska plant is defendant's Trim Division which makes parts such as headliners and door panels for the automotive industry. Employees at defendant's plant work in teams in the assembly process. Some of the activities conducted by the teams are potentially hazardous such as hydraulic and electronic presses, forklifts and hot glue and adhesive.

Defendant employs approximately 230 people at its Kalkaska plant. Each of the employees signed an application form in which the language varied slightly depending on the year of application. However, each of the applications contained one of the paragraphs below:

> I understand and agree that if employed, the employment relationship can be terminated at will without notice or cause by either party, notwithstanding any other oral or written statements by the company prior to, at or following the date of employment, unless set out in writing, dated, and executed by both parties.
>
> or
>
> I also understand and agree that, if hired, my employment is for no definite period and may, regardless of the date of payment of my wages, be terminated for any reason or no reason at any time at the sole discretion of the company without prior notice.
>
> or
>
> I understand and agree that, if hired, my employment is for no

> definite period and may, regardless of the date of payment of my wages and salary, be terminated at any time without any prior notice.

The employee handbook was given to each employee states:

> This handbook, with its rules and regulations, is not to be considered as generating terms and conditions of an employee contract. You have the right to terminate your employment at any time without notice and without cause, and the company maintains the same right.

The employee handbook also contains a progressive discipline section which sets forth four basic disciplinary steps. There is first a verbal warning, followed by a written warning, a final warning and discharge. The disciplinary section also states:

> These 3 steps may not always be followed. It depends on how serious or negligent the initial offense is. If a serious offense takes place, discharge may result without any of the other warnings taking place.

> If any employee receives disciplinary action which they feel is unfair, management will have an open ear and listen to your complaint. A discussion of all of the facts should reveal the most fair decision. The most important point that should be made when disciplinary action occurs is that it is done in the most fair and equitable manner possible.

In 1988 and 1989, defendant's management became aware of a drug problem at its Kalkaska plant. Defendant became aware of the problem through employee complaints, truck drivers making deliveries and a building contractor doing work at the plant. In response to this information, defendant posted a drug free workplace policy in April 1989. This policy prohibited employees from possessing, using or being under the influence of drugs while at work and provided that employees could be tested for drug use. Defendant also required all new applicants to

submit to drug testing as a prerequisite to being hired.

In April, 1989, defendant consulted with the Grand Traverse Narcotics Team and the Kalkaska County Sheriff and placed an undercover officer in the plant as an employee. The officer arrested two employees for selling drugs. For emphasis, defendant agreed to have the employees arrested at the plant. It is unclear from the pleadings whether these employees were arrested for selling drugs at the plan or at some other place. After the undercover officer finished his undercover work, he reported to defendant's management that he estimated that as many at 60% of defendant's employees used drugs at home, at work or both. Several of the plaintiffs have admitted that people were using drugs at work.

On July 17, 1989 a new drug free workplace policy was posted. That policy stated:

> It is the policy of this Company to provide a workplace free of alcohol and drugs, and to ensure that employee alcohol or drug use does not jeopardize the success of its operations, or otherwise affect the Company, its employees or its customers.
>
> The use, sale, attempted sale, manufacture, purchase, attempted purchase, possession or transfer of alcohol or an illegal drug while on Company property or reported to work with alcohol, illegal or illicit drugs in the employee's system is a violation of Company rules and will result in disciplinary action, up to and including discharge.
>
> Employees who believe or have been informed that their use of a drug (prescribed or over-the-counter) may present a safety risk, are to report the use of such drug to their supervisor before starting to work to ensure safety of themselves, other employees and Company property.
>
> Employees who believe they have an alcohol or drug abuse problem can seek voluntary assistance through

the personnel department. It is the employee's responsibility to seek help before the employee's alcohol or drug problems lead to disciplinary action, up to and including discharge. The Company will assure strict confidentiality to each employee who seeks assistance, and will assist each employee in obtaining the needed help through the Company's group medical benefits.

While the Company believes in respecting the rights of employees, it is also concerned about the safety, job security and job performance problems created on the job through the use of drugs and alcohol by employees.

In order to protect the well-being of our employees, our facilities and the community in which we live, each employee, as a condition of employment will be required, upon request of Company supervisory personnel, to submit to blood and/or urine tests for determining use of alcohol and/or illegal or illicit drugs.

Employees convicted of criminal drug statute violations, which result from activities occurring on or off Company premises while conducting Company business, must notify the Company within five (5 days of the conviction.

> Employees must abide by the terms of this Policy as a condition of continued employment.

This policy was also included in the handbook distributed to the employees on August 7 and 8, 1989.

On August 10 and 11, 1989, defendant announced that it was going to conduct drug testing on those days. Only three people in management knew about the tests ahead of time. The men and women employees were asked to go into the men and women's bathrooms respectively and produce urine samples. There was a nurse present in each bathroom (a male nurse in the men's bathroom and a female nurse in the women's.) Employees were told that, if they did not want to take the test, they could leave the plant and they would be considered a voluntary quit. Some employees were are plaintiffs in this suit did leave and were considered as voluntary quits as of

that date. The remaining employees who gave samples signed consent forms and initialed chain of custody forms. Employees who were tested later were tested at a local health clinic. The samples were sent to SmithKline Bio-Science Laboratories in St. Louis, Missouri for testing. The testing for marijuana was set at a level to register a negative for anyone who had been exposed to passive inhalation of the substance. All positive results were confirmed by gas chromatograph/mass spectrometry which defendant believes is the same testing format used by the National Football League. A number of the plaintiffs tested positive for marijuana, one tested positive for cocaine and one for propoxyphene. Plaintiff Daniel Schelske was retested because of contamination and his second test was positive. Plaintiff Daniel Cummer tested

negative. However, on August 16, 1989, he refused a work assignment, walked off the job and was considered a voluntary quit.

Following the drug testing, the news media were informed by one of the plaintiffs that it had occurred. As a result, the media contacted Michael Aslanian, defendant's vice president, for comment. Mr. Aslanian confirmed the drug testing. Mr. Aslanian also confirmed that some employees had left rather than take the test and the some (sic) employees had been terminated for positive test results. At no time did Mr. Aslanian name any of the employees nor did defendant initiate the media coverage.

Count I of plaintiffs' third amended complaint alleges breach of contract for the failure of defendant to follow the progressive disciplinary stages set forth in the employee handbook in the drug testing and

termination of employees. Count II alleges that defendant defamed plaintiffs by indicating or implying to news agencies, the Michigan Department of Labor or others that plaintiffs were drug users. Count II alleges invasion of plaintiffs' right of privacy under the United States and Michigan constitutions. Count III also alleges a cause of action under the common law tort of invasion of privacy in that the test itself was an invasion of privacy as was the breach of confidentiality promised by the defendant's drug free workplace policy. Count III also alleged an invasion of privacy by the publication of the testing, the reasons for testing and the plaintiffs' involvement or lack of involvement in the testing. Count IV alleges defendant's misrepresentation of its policy and plaintiffs' detrimental reliance on this

misrepresentation. Count V alleges negligent handling of the situation.1 Count VI alleges a violation of the Michigan Handicappers' Civil Rights Act. In their brief, plaintiffs restrict their argument to their claims for breach of contract, defamation and invasion of privacy. Plaintiffs apparently abandon their claims of misrepresentation, negligence and violation of the Michigan Handicappers' Civil Rights Act. However, this opinion will briefly discuss those three areas.

ANALYSIS

Rule 12(b) provides that, if on a Rule 12(b)(6) motion matters outside the pleadings are submitted to the Court and the Court considers them, the Court shall treat the motion as one for summary judgment under Rule 56. Both plaintiffs and defendant have submitted documents outside the pleadings in support of their arguments. The Court has

considered those documents and will treat this motion as one for summary judgment.

On a motion for summary judgment, the Court reviews the evidence in a light most favorable to the nonmoving party. The moving party has the burden of showing the Court that "there is an absence of evidence to support the nonmoving party's case." Celotex v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265, 275 (1986). The nonmoving party must present the Court with specific facts which demonstrate that there is a genuine issue for trial. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538, 552 (1986). Summary judgment is precluded if there is a dispute with regard to a fact "that might affect the outcome of the suit." Anderson v. Liberty Lobby, Inc.,

477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202, 211 (1986).

Defendant argues that Count I of plaintiffs' third amended complaint should be dismissed because defendant did not breach any contract with plaintiffs. Defendants argue that plaintiffs' employment was an at-will employment and that defendant was under no obligation to use the progressive disciplinary procedure set out in the handbook in this situation. In their brief, plaintiffs argue that they had a contractual right to be disciplined under the progressive disciplinary procedure and to be treated fairly. Plaintiffs rely exclusively on Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579 (1980), in support of their arguments on this issue.

This Court recently spoke to this issue in McCormick v. Sears, Roebuck and Co., 712 F. Supp. 1284 (1989). This Court stated:

> Michigan law, applicable in this diversity action,continues to recognize the general rule that employment for an indefinite term is terminable at will; that is, terminable by either party at any time for any or no reason. Suchodolski v. Michigan Consolidated Gas Co., 412 Mich. 692, 694-95, 316 N.W.2d 710 (1982). This rule may be altered by agreement of the parties, express or implied. Valentine v. General American Credit, Inc., 420 Mich. 256, 258-59, 362 N.W.2d 628 (1984); Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980).

As in McCormick, the employees in the present case signed employment applications which contained language making their employment at-will and the handbook did not contain any language stating that employment with defendant would terminate only upon a showing of just cause. This Court relied on Reid v.

Sears, Roebuck and Co., 790 F.2d 453 (6th Cir. 1986) in support of its grant of summary judgment to defendant in McCormick.

The Reid Court stated that an employer could defeat claims that discharge could only be for good cause by having prospective employees sign application forms which indicated that employment would be terminable at will. Id. at 461. The Court went on to state:

> Though Toussaint holds that there may be an implied contract that employment may be terminated only for good cause, it does not hold that this may be the case where an express contract makes the term of employment at will. It is well settled in Michigan that there cannot be an implied contract covering the same subject as an express one. Steele v. Cold Heading Co., 125 Mich. App. 199, 203, 336 N.W.2d 1 (1983); In re DeHaan's Estate, 169 Mich. 146, 149, 134 N.W. 983 (1912).

712 F. Supp. at 462. See Pratt v. Brown Machine Co., 855 F.2d 1225, 1233-1236 (6th Cir. 1988). The Michigan Court of Appeals

addressed this issue in Loftis v. G T Products, Inc., 167 Mich. App. 787 (1888). The Loftis case is indistinguishable from the instant case. In Loftis, Section 19 of the employee handbook listed certain conduct which could result in discharge. Section 18 listed a four step procedure for disciplinary action. Plaintiff was fired for refusing to work overtime, a basis for discharge or discipline under Section 19. Defendant referred the matter to an employee committee which was one step under Section 18. After the committee reviewed the matter, it recommended that plaintiff be terminated and he was. Plaintiff argued that he had a right to have all four steps completed prior to termination. The trial court granted defendant's motion for summary disposition and the Court of Appeals affirmed. The Court found that the language of section 19 would

leave an employee with the conclusion that refusing overtime could result in termination. Id. at 792. In the present case, the language of the drug free workplace policy would leave an employee with the conclusion that he would be discharged if he was found to have used drugs at the workplace or to have drugs in his system when he reported to work.

Plaintiffs point to the language in the handbook that says that employees will be treated fairly and suggest that such language makes fair treatment an element of the employment contract. Such a conclusion cannot be supported in light of the clear at-will language of the employment application form and the statement in the handbook that "[t]his handbook, with its rules and regulations, is not to be considered as generating terms and conditions of an

employee contract. You have the right to terminate your employment at any time without notice, and without cause, and the company maintains the same right." This language clearly delineates the plaintiffs' employment with defendant as an at-will employment. The Court will grant defendant's motion for summary judgment as to Count I.

Count II of plaintiffs' third amended complaint alleges defamation through Aslanian's comments to the Michigan Department of Labor and the media. Defendant argues that it has an absolute privilege as to its statements to the Michigan Department of Labor. Defendant also argues that it has the defense of truth and of qualified privilege as to statements to the media. Plaintiffs argue that Mr. Aslanian defamed them by portraying them as heavy drug users whether or not they took the tests.

Plaintiffs also argue that the claim of qualified privilege is questionable and should not be a basis for summary judgment. Plaintiffs apparently abandoned their argument with regard to the disclosures to the Michigan Department of Labor and, instead, concentrated on the disclosures to the media.

If a communication tends to lower the reputation of another in the estimation of the community, it is defamatory. Swenson-Davis v. Martel, 135 Mich. App. 632, 635, lv. den. 419 Mich. 946 (1984). If a communication accuses a person of a crime, it is defamatory per se. Wilkerson v. Carlo, 101 Mich. App. 629, 632 (1980), lv. den. 411 Mich. 984 (1981). When the facts concerning the dispute and the occasion of the communication are not in dispute, the question of whether there is a qualified

privilege is one of law for the court. Bostetter v. Kirsch Co., 319 Mich. 5467, 30 N.W.2d 276, 279 (1948); Swenson, 135 Mich. App. at 636; Tumbarella v. The Kroger Co., 85 Mich. App. 482, 493 (1978).

The Michigan courts have stated that a qualified privilege exists where "the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty." Bostetter, supra; Swenson, supra; Tumbarella, supra. The Bostetter court, setting forth the rule, stated:

> A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he ins good faith

> proceeds to do. This general idea has been otherwise expressed as follows: A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation.

30. N.W.2d at 280 (quoting 17 R.C.L., p. 341 and 33 Am. Jur., p. 124).

If the Court determines that defendant had a qualified privilege to make the statements, it must then determine whether a dispute as to a material issue of fact exists with regard to whether defendant made the statement with actual malice and whether the statements were false. Bostetter, 30 N.W.2d at 280-81; Swenson, 135 Mich. App. at 637; Tumbarella, 85 Mich. App. at 494; Iacco v. Bohannon, 70 Mich. App. 463, 467 (1976) lv.

den. 399 Mich. 846 (1977). In order to prove actual malice, plaintiffs must show that defendant made the statements with knowledge that they were false or with a reckless disregard as to whether they were false or not. Swenson, 135 Mich. App. at 637.

In this case, plaintiffs presented copies of certain publications wherein defendant's president Aslanian, was quoted. Defendant has stated that one of the plaintiffs initiated the media coverage of defendant's drug testing program. The Court has reviewed all of the statements of Aslanian with regard to the drug testing in this case. The Court finds that the statements of Aslanian could be considered defamatory to plaintiffs as a group but finds that defendant is protected by a qualified privilege pursuant to Bostetter. The Bostetter case is particularly instructive on

this issue. In Bostetter, plaintiff claimed that certain statements of defendant published in the local paper were defamatory. Defendant in that case had requested the city council to close a certain street pursuant to regulations of the War Department. After those regulations changed, defendant attempted to have the street opened again and apparently met with some difficulty. In order to present its side of the issue, the defendant published a letter "To the Citizens of the City of Sturgis" in the local paper. Plaintiff, a member of the city council at that time, found the statements to be defamatory. Since the defendant was attempting to put its side of the story before the general population and the general population had an interest in the information, the court found that defendant had a qualified privilege. In the present

case, this Court finds that, after one of the plaintiffs contacted the media, defendant's drug testing program became an issue which was hotly debated in the community and an issue of considerable local interest. Therefore, defendant had a qualified privilege to make the statements it made in order to place its side of the story before the public.

The Court must now look to whether plaintiffs have presented sufficient proof to survive a motion for summary judgment with regard to whether defendant made the statements with actual malice or made false statements. A review of the statements made indicate that defendant explained what the company was doing and stated that some individuals quit rather than take the test and some were discharged for positive results. Defendant never stated that the

individuals who quit rather than take the test were drug users and, contrary to plaintiffs' assertions, defendant never portrayed plaintiffs as "heavy drug users." Evidence presented by defendants indicates that only three plaintiffs allege that they have never taken drugs. Only one of those three plaintiffs is in the category of plaintiffs who tested positive. That individual indicated that the night before the test he was in the presence of people who were smoking marijuana and his test must have resulted from passive inhalation. Defendant presented evidence that such a test result is impossible. Plaintiffs did not present any evidence to refute defendant's evidence. In light of all the facts presented to the Court, the Court finds that there is no dispute as to a material issue of fact with regard to whether defendant made the

statements with actual malice. The Court finds that defendant made true statements which explained the defendant's drug testing program. In addition, defendant did not imply that all who left defendant's employ were drug users but explained that some left because they chose not to participate and some left because of positive test results. Those are all true statements. The Court will grant defendant's motion for summary judgment as to Count II of plaintiffs' complaint.

Count III of plaintiffs' third amended complaint alleges invasion of privacy under the United States and Michigan constitutions. Defendant argues that plaintiffs have no cause of action for a constitutional violation because defendant is a private not a government actor. Plaintiffs do not pursue this avenue in their response to defendant's

motion for summary judgment. Plaintiffs argue solely that defendant has committed the tort of invasion of privacy according to Michigan law in the manner of drug testing and in the publication of the use of drug testing in the local media.

The Fourth Amendment to the United States Constitution does not protect against a search or seizure by a private party on its own initiative, even if the search or seizure is an arbitrary action. Skinner v. Railway Labor Exec. Assn., 489 U.S. __, 109 S.Ct. __, 103 L.Ed.2d 639, 657 (1989). The Court knows of no such protection under the Michigan Constitution and plaintiffs have provided no support for such protection. Plaintiffs are, therefore, left to their claims of the tort of invasion of privacy.

Michigan has recognized a right of the individual to privacy. Beaumont v. Brown,

401 Mich. 80, 95 (1977).. The Michigan courts have recognized four types of invasions of privacy, being (1) intrusion upon a persons' seclusion or solitude or into his private affairs, (2) public disclosure about embarrassing private facts, (3) publicity which places a person in a false light in the public eye, and (4) appropriation of a person's name or likeness for defendant's advantage. Id. at 95 n. 10. This case involves the first two types.

The first type of invasion of privacy requires that there be (1) an intrusion (2) into an area where plaintiffs have an expectation of privacy and (3) such intrusion must be offensive to a reasonable person. Saldana v. Kelsey-Hayes Co., 178 Mich. App. 230, 233-35 (1989); Harkey v. Abate, 131 Mich. App. 177, 181-82 (1983), lv. den. 419 Mich. 912 (1984); Earp v. City of Detroit, 16

Mich. App. 271, 275-77 (1969). The Harkey court stated that the activity must be "highly offensive to a reasonable person." 131 Mich. App. at 182. The right to be free from this type of invasion of privacy is not absolute. Earp, 16 Mich. App. at 276. The Earp court quoted 77 CJS, Right of Privacy, §3, pp. 401, 402, which stated:

> In determining the extent of the right of privacy, it is essential to consider it in the light of duties imposed on individuals as citizens of a free country and in the light of an individual's relation to the community of which he is a member, and such right does not extend so far as to subvert those rights which spring from social conditions, including business relations, or to prohibit the publication of matter which is of public or general interest or benefit.

Id. at 276. See Saldana, supra. In Earp, the Court of Appeals recognized the right of the employer to investigate suspected illegal conduct of an employee committed in the

course of his employment. Saldana, 178 Mich App. at 235.

Plaintiffs in this case are divided into two classes. One class consists of plaintiffs who refused to participate in the testing and the other consists of those who tested positive for drugs. Those who did not participate cannot succeed on this count because there was no intrusion. Therefore, Count III will be dismissed as to those plaintiffs.

As to the remaining plaintiffs, the Court finds that the taking of urine samples is an intrusion in an area in which plaintiffs may have an expectation of privacy. However, in this case, the Court finds that plaintiffs had no expectation of privacy with regard to drug testing since they had been on notice since July 17, 1989 that they might be subjected to drug testing

as a condition of employment. As discussed in Saldana, supra, employers have a right to investigate into areas which would normally be private if the investigation springs from the business relationship. In this case, the employer was concerned about the safety of its workers and the productivity of the plant. This was a justifiable concern since the work at defendant's plant included activity which could be hazardous to someone who was not in total control of his faculties. Defendant has stated that there were several activities at its plant which gave rise to concern The combination of the notice and the business concerns leads this Court to find that plaintiffs did not have an expectation of privacy with regard to urinalysis under the law of Michigan.

The final element of the tort is that the intrusion be offensive to a reasonable

person. The Court finds that plaintiffs cannot prove this third element. The testing was carried on in the bathroom with a nurse present and the nurse was of the appropriate gender. In addition, anyone who wanted the additional privacy of a stall in which to give the sample had just to ask. This Court joins its learned colleague the Honorable George La Plata of the Eastern District of Michigan in finding that such activity is not offensive to a reasonable person. DiTomaso v. Electronic Data Systems, Docket Number 87-CV-60320-AA (1988).

Plaintiffs also claim invasion of privacy in defendant's public disclosure of an embarrassing private fact. In order to prevail on a claim of invasion of privacy for public disclosure, plaintiffs must prove that the disclosed information would be highly offensive to a reasonable person and that the

information be of no legitimate concern to the public. Fry v. Ionia Sentinel-Standard, 101 Mich. App. 725, 1728-29 (1980). Such information also must concern only private, not public facts, about an individual. There is no liability for giving further publicity to information which the plaintiff has already made public. Id. at 729 (quoting 3 Restatement Torts 2d, §652D, comment b, pp 385-386).

Plaintiffs have not supported this claim. It is possible that a reasonable person would find it highly offensive to have it reported that he failed a drug test. However, no plaintiff was named as having tested positively for drugs. Of more importance to the Court is that the drug testing was made public by one of the plaintiffs before defendant made any comment. In addition, the widespread media coverage

which ensued from that contact with the media made the situation at defendant's plant one of public concern about which defendant had a right to comment. The Court will grant defendant's motion for summary judgment with respect to Count III of plaintiffs' complaint.

Count IV of plaintiffs' third amended complaint alleges a claim of misrepresentation based on statements in the employee manual. Plaintiffs do not present any argument on this Count in their response to defendant's motion for summary judgment. This Court recently addressed this issue in McCormick v. Sears, Roebuck and Co., 712 F. Supp. 1284 (W.D. Mich. 1989). This Court stated:

> An action for fraudulent misrepresentation must normally be predicated upon a statement relating to a past or existing fact; future promises are contractual and do not constitute

> fraud. Here, all of the misrepresentations relied upon are contractual future promises. They may constitute fraud only if made in bad faith without present intention of performance. Plaintiff has presented no evidence that any of the cited representations was made in bad faith....
>
> This total absence of evidence regarding an essential element of the claim renders all other potential fact questions immaterial and is fatal to the claim.

Id. at 1289-90 (citations omitted). The plaintiff in McCormick was also relying on promises she alleged were in the employee handbook. Plaintiffs here do not present any facts separate from the handbook in support of their claim that there was misrepresentation. The Court will grant defendant's motion with regard to Count IV.

Count V of plaintiffs' third amended complaint alleges a claim for negligent breach of contract. In Michigan, a tort action will not lie in negligence for breach

of contract unless there is a breach of duty separate and distinct from the breach of contract claim. Haas v. Montgomery Ward and Co., 812 F.2d 1015, 1016 (6th Cirt. 1987); Mitchell v. GMAC, 187 Mich. App. 23, 34-35 (1989). There has been no allegation of a breach of duty separate and distinct from the breach of contract in this case. The Court will grant defendant's motion for summary judgment with regard to Count V.

Count VI of plaintiffs' third amended complaint alleges a claim for violation of the Michigan Handicappers' Civil Rights Act pursuant to M.C.L. §37.1101, et seq. Plaintiffs do not allege the nature of their handicap in their complaint and do not make any allegations or arguments in this regard in their response to defendant's motion for summary judgment. This Court can see no way in which this Act was violated in this case.

The Court will grant defendant's motion for summary judgment with regard to Count VI.

In conclusion, the Court finds that all of plaintiffs' claims are without merit and grants defendant's motion for summary judgment as to all counts of plaintiffs' third amended complaint. Plaintiffs' third amended complaint will be dismissed.

Date: July 30, 1990

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

(2)

No. 92-513

Supreme Court, U.S.
FILED
OCT 15 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

RALPH BAGGS, VERN BAGGS, JR., GARY A. DELECKI, LORI J. GLICK, MERRILL J. HANSEN, TRACY HELSEL, ROBERT KANAZIZ, ANTHONY F. KROL, PENNY J. PAHL, GARY PARKER, GARY ROESSLER, MARK RUSSELL, DAVID WILSON, MARY ANN FENDER, WALTER MONTNEY, PATRICIA RUSSELL, DANIEL SCHELSKE, NADINE WELLS, JAMES D. WILSON II, JAMES MacDONALD,

Plaintiffs-Petitioners,

THOMAS A. BROWN, BILL ELYA III, GARRY MOORE, TIMOTHY MORRISON, DEANE W. PAHL,

Plaintiffs,

v.

EAGLE-PICHER INDUSTRIES, INC., an Ohio Corporation,

Defendant-Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court should exercise its discretion to review the dismissal of plaintiffs-petitioners' state law claims where the lower court's decision does not conflict with the decisions of other circuit courts or Michigan law?

II. Whether this Court should exercise its discretion to review the dismissal of plaintiffs-petitioners' state law claims where the issues in this case are not sufficiently important to warrant this Court's attention because there is absolutely no federal question involved, let alone a substantial one?

III. Whether this Court should exercise its discretion to review the dismissal of plaintiffs-petitioners' state law claims where the lower courts gave full consideration to the issues and decided them correctly and fairly in accord with state law?

RULE 29.1 STATEMENT

Pursuant to S.Ct. Rule 29.1, Eagle-Picher Industries, Inc. discloses that it has no parent company but has the following non-wholly owned subsidiaries:

American Imaging Services, Inc.
Diehl & Eagle-Picher GmbH
Tri-Sigma Corporation

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The opinion of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court for the Western District of Michigan is reported at 957 F.2d 268 (6th Cir. 1992). The opinion of the United States District Court for the Western District of Michigan is reported at 750 F. Supp. 264 (W.D. Mich. 1991).

STATEMENT OF THE CASE

I. Introduction

The plaintiffs-petitioners seek a judicially created limitation on the extent to which a private employer may attempt to deal with a major problem of employee drug use by utilizing a plant-wide drug screen urine test. The petitioners are former employees of respondent Eagle-Picher Industries, Inc.'s Trim Division in Kalkaska, Michigan who either quit rather than submit to a drug test or were terminated because of a positive test result for illegal drugs.

The petitioners' complaint and amendments alleged the following claims: 1) breach of contract; 2) defamation; 3) invasion of privacy (common law and constitutional); 4) misrepresentation; 5) negligence; and 6) Michigan's Handicapper's Civil Rights Act.

Honorable Robert Holmes Bell of the United States District Court for the Western District of Michigan granted summary judgment under Fed. R. Civ. P. 56 in

favor of respondent on all of petitioners' claims. Petitioners appealed the trial court's decision with respect to Count I (breach of contract), Count II (defamation) and Count III (common law invasion of privacy) of their Third Amended Complaint. Petitioners did not appeal the dismissal of their other claims. The Sixth Circuit Court of Appeals properly affirmed the trial court's decision.

II. Counter-Statement of Facts

Petitioners were obligated to demonstrate to the trial court by affidavits, depositions, interrogatory answers, or admissions that there was a genuine issue of material fact for trial. *Vollrath v. Georgia-Pacific Corp.*, 899 F.2d 533, 535 (6th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S.Ct. 345 (1990). Petitioners have done nothing more than make an argumentative and unsupported statement of facts. Many of petitioners' so-called "facts" are simply wrong and none were supported by record evidence before the lower courts as required by law.

Eagle-Picher's Trim Division. Respondent Eagle-Picher Industries, Inc.'s Trim Division makes parts such as headliners and door panels for the automotive industry. In order to remain viable in this extremely competitive industry, Eagle-Picher's Trim Division must constantly increase its efficiency and productivity. The assembly process at the Trim Division uses teams of workers to produce finished parts. If a team member is inefficient or unable to perform, it adversely affects the

ability of the entire team to reach production goals and meet quality standards. (Aslanian Aff, ¶ 4)[1]

The manufacturing process at the Trim Division utilizes numerous machines which are potentially hazardous and could severely injure employees if misused. Injuries to workers have resulted from these operations. (Aslanian Aff, ¶ 3)

In August of 1989, the approximately 230 Trim Division employees were non-union and employed on an at-will basis. Each of the petitioners signed an employment application which contains language indicating employment-at-will. (Aslanian Aff, ¶¶ 2 and 23) Employment-at-will language is also set forth in the company's employee handbook.

The Drug Problem. Beginning in late 1988 and continuing into 1989, company management became aware of a growing problem of illegal employee drug use at the Trim Division plant. Many employees were making complaints and comments to management officials about the drug use by other employees while at work. Company management also heard from truck drivers making deliveries to the plant and from a building contractor working at the plant that many employees were using drugs. One of the supervisors overheard a CB radio conversation between truck drivers in which the plant was referred to as a "drug house". (Aslanian Aff, ¶ 5)

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[1] These references are to the affidavit of Trim Division President Michael Aslanian. Petitioners' deposition testimony will be referenced by the deponent's name and the transcript page where the testimony occurred.

In response to these complaints concerning drug use, a drug free workplace policy was posted in April, 1989. That policy prohibited employees from possessing, using or being under the influence of drugs while at work, and also provided that under certain circumstances employees could be drug tested. In addition, all employee applicants were required to take drug tests as a prerequisite to hiring. (Aslanian Aff, ¶ 7)

When the employee complaints about drug use persisted, Division President, Michael Aslanian, consulted with the Kalkaska County Sheriff and with representatives of the Grand Traverse Narcotics Team. Consequently, an undercover agent was placed in the plant as an employee from mid-April until early June, 1989. Two Trim Division employees were arrested at work for selling drugs as a result of that undercover operation. Those employees were immediately discharged. (Aslanian Aff, ¶ 8)

The undercover agent estimated after he had finished his operation that as many as 60% of the company's workforce used drugs at home or at work or both. In addition, he gave Mr. Aslanian reason to believe that some of the plant's supervisors were also involved in drugs. (Aslanian Aff, ¶ 8) Many of the petitioners have admitted that there was widespread drug use. (Cummer Dep, 28-29; Krol Dep, 37; Montney Dep, 32; Hansen Dep, 14, 42-43)

With confirmation from the undercover agent that a problem existed and that it was more widespread than originally believed, Mr. Aslanian met in late June, 1989 with his superiors to determine what action to take.

(Aslanian Aff, ¶ 9) At that meeting, it was decided to institute drug testing of all Trim Division employees. Company officials considered and rejected using random drug testing, because they felt it was less fair than testing all employees and, given the extent of the problem, it would be an ineffective deterrent. Company officials also considered testing employees only if there was some individualized suspicion of drug use, but although employees complained about the drug problem, they were reluctant to "rat on" other employees. The company's concern about the ineffectiveness of using drug tests on only a selective basis was heightened by the belief that some supervisors were either themselves using drugs or were failing to vigorously support the company's drug policy. Therefore, company management felt that the fairest and most effective way of combating the problem was to use plant-wide testing of all employees. (Aslanian Aff, ¶ 9)

In preparation for the testing, the company's drug free workplace policy was revised to clarify that coming to work with illegal drugs in an employee's system was a dischargeable offense. This revision strengthened the earlier provision that prohibited an employee from working under the influence of drugs in order to avoid any argument about whether an employee was or was not "under the influence" of drugs. The policy was also revised to indicate that submitting to a drug test at the request of company management was a condition of continued employment. (Aslanian Aff, ¶ 10)

The policy also contained the provision that was found in the earlier policy that any employee who believed that he or she had a drug problem could come to

company management and request and receive help. Both policies made it clear, however, that in order to qualify for help, the employee had to come forward on his or her own initiative before the company received information that the employee had violated the company's drug policy.

The revised drug policy was posted on the employee bulletin board on July 17, 1989. (Aslanian Aff, ¶ 10; Paul Dep, 22; Montney Dep, 20) A second posting was placed on another bulletin board which was used for personal employee messages, and that posting urged the employees to review the new drug policy. Supervisors were also instructed to inform employees of the new drug policy and urge them to read it. (Aslanian Aff, ¶ 10) The revised drug policy was also included in the employee handbook which was distributed on August 7 and 8, 1989. (Third Amended Complaint, Ex. A, p. 35)

The Drug Testing. The drug testing was scheduled to begin at the start of the second shift on August 10, 1989 and continue with the third and first shifts on August 11th. At the beginning of the second shift on August 10th, Mr. Aslanian called a meeting of all the employees and notified them that because of the extent of the drug problem, and because it was his intention to provide a drug free workplace in order to protect the safety and jobs of all employees, every employee in the plant would be required to submit to drug testing that afternoon. He indicated that if any employee did not wish to submit to drug testing, that employee simply had to leave the plant and he or she would be considered to have voluntarily resigned. All employees who remained, however, would be required to take the test, and any employee testing

positive for illegal drugs would be terminated. Some employees did choose to leave the plant. All the employees who remained were tested. (Aslanian Aff, ¶ 11)

The testing was conducted under the supervision of a professional testing organization, Drug Services Intervention Administration. Each employee signed a consent form before being tested. The samples were collected in the plant lavatories with a nurse (male or female as appropriate) present to assure that the samples were not contaminated or otherwise tampered with, but the nurses did not directly observe the void. (Aslanian Aff, ¶ 12)[2]

After a sample was collected, it was sealed and the employee initialled a chain of custody form. The samples were then sent by Air Express to SmithKline Bio-Science Laboratories, where they were tested at pre-set threshold levels for the presence of specified illegal drugs. Each positive test was confirmed by gas chromatograph mass spectrometry (GC/MS). The combined accuracy of the preliminary test and the GC/MS was 100%. If a sample did not show the presence of drugs at or above the pre-set level, the test was reported as a negative result.[3] (Aslanian Aff, ¶ 13; Affidavit of Leland McClure, Ph.D., Director of SmithKline Laboratory, ¶¶ 4-5)

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[2] Those employees who were absent on August 10th or 11th were tested later at a Kalkaska area health clinic, again under the supervision of trained medical personnel.

[3] Marijuana was tested at a level of 50 nano-grams per milliliter, which is the same testing level utilized by the National Football League, and which rules out ingestion of marijuana through passive inhalation.

The test results were returned to the Trim Division by SmithKline Laboratories on August 16, 1989. Mr. Aslanian talked to each employee who had tested positive for an illegal drug and informed them of their discharge. Mr. Aslanian also told each discharged employee that if they completed a drug rehabilitation program, they would be eligible for rehire. (Aslanian Aff, ¶ 14)

Petitioners' Admitted Drug Use. All but one of the petitioners who were discharged because of a positive drug test result and have been deposed have admitted using an illegal drug during the period of time prior to the drug testing and do not contest the accuracy of the drug test. Of the petitioners who quit rather than take the test and have been deposed, only two have denied any drug use whatsoever. The other petitioners in this category have admitted to at least some illegal drug use.

Media Inquiry. The drug problem at the Eagle-Picher Trim Division and the resulting drug testing and discharges came to the attention of the Traverse City area news media, and the company was besieged with media inquiries. It is undisputed that no one from company management contacted the media to inform them of the drug testing. (Aslanian Aff, ¶ 20) To the contrary, one of the petitioners, Anthony Krol, testified at his deposition that he told a reporter for the Traverse City Record-Eagle what had occurred, that some people had been terminated for testing positive, and that others quit rather than take the drug test. Mr. Krol did not tell the reporter about the drug usage which Mr. Krol had observed at the plant. (Krol Dep, 52-53) Mr. Krol also talked to a reporter from the Detroit News about the same subjects. (Krol Dep, 56-57)

Due to no action of his own, Mr. Aslanian was nevertheless confronted by media representatives asking for comments. Mr. Aslanian was concerned that if he said nothing, the company might be portrayed unfairly and inaccurately as a company that had a continuing drug problem, and there would be a sense that employee morale at the Trim Division facility was very low because of the drug testing. Mr. Aslanian feared these impressions could hurt the company's position with its customers, suppliers and potential employees. (Aslanian Aff, ¶ 21) Accordingly, Mr. Aslanian responded to the media, explained the concern which had given rise to the drug testing, discussed in general terms the testing process and results, and stated his belief that the majority of the employees accepted the drug testing and that employee morale was high. Mr. Aslanian never mentioned any employee by name. (Aslanian Aff, ¶ 21)

REASONS FOR DENYING THE WRIT

Petitioners claim that this Court should grant certiorari to review the decision of the Sixth Circuit because: (1) the opinion below conflicts with a decision of the Third Circuit and somehow alters Michigan law; and (2) this case involves issues of national importance. Petitioners' arguments fail and this Court should not exercise its extraordinary and discretionary jurisdiction for the reasons discussed below.

I. THE THIRD CIRCUIT DECISION CITED BY PETITIONERS DOES NOT CONFLICT WITH THE SIXTH CIRCUIT'S DECISION IN THIS CASE AND IT IS PRESENTLY ON REMAND TO THE TRIAL COURT SO IT IS NOT RIPE FOR CONSIDERATION BY THIS COURT.

Petitioners argue that the Sixth Circuit's decision in this case conflicts with the decision of the Third Circuit in *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3rd Cir. 1992). Nothing could be further from the truth. Not only is *Borse* factually distinguishable from this case, it involves a claim of wrongful discharge in violation of public policy, a claim which was not pleaded by the petitioners in their three amended complaints nor raised or decided in the courts below.

In *Borse*, the Third Circuit held that, *under certain circumstances*, the discharge of a private-sector at-will employee who refuses to take a drug test may be in violation of the public policy embodied in Pennsylvania cases recognizing the tort of invasion of privacy.

The Third Circuit envisioned two ways in which an employer's urinalysis program might violate Pennsylvania public policy: (1) if test monitors directly observe urination during the specimen collection; and (2) if private medical facts about the employee are disclosed as a result of the drug test (i.e., pregnancy, diabetes, etc.).

Because the plaintiff in *Borse* did not sufficiently allege facts to support such a claim, the Third Circuit remanded the case to the trial court so the plaintiff could amend her complaint. The Third Circuit directed the trial court to examine the circumstances surrounding the

alleged wrongful discharge to determine whether the employer's particular urinalysis program involved a highly offensive intrusion into the employee's privacy.

A. Borse Is Legally Distinguishable From This Case Because Michigan Courts Do Not Recognize A Cause Of Action For Wrongful Discharge In Violation Of Public Policy Based On Judicial Opinion.

Borse is legally distinguishable from this case for several reasons. First, although Michigan courts recognize that employers cannot discharge or otherwise discipline at-will employees for reasons that will contravene settled public policy, such an action can be based on one of three grounds:

> (1) "explicit *legislative statements* prohibiting the discharge, discipline, or other adverse treatment of employees in accordance with the statutory right or duty";
>
> (2) "*legislative expression of policy*" from which a cause of action can be implied (i.e., when an employee is discharged for refusing to violate a law); and
>
> (3) an implied prohibition against retaliatory discharge, "when the reason for discharge was the employer's exercise of a right conferred by a *well-established legislative enactment*" (i.e., filing a workers' compensation claim).

Suchodolski v. Michigan Consolidated Gas Co., 412 Mich. 692, 695-696, 316 N.W.2d 710, 711-712 (1982) (per curiam) (emphasis added).

Petitioners simply argue that Michigan case law recognizing the common law tort of invasion of privacy

constitutes an expression of public policy. Petitioners' position is contrary to an unbroken line of authority in Michigan that an employee must identify a *specific legislative statement* upon which to base a claim for violation of public policy. *See Suchodolski, id.*; *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983), *lv. to app. den.*, 424 Mich. 879 (1986); *Hrab v. Hayes-Albion Corp.*, 103 Mich. App. 90, 302 N.W.2d 606 (1981). There is no legislative enactment or legislative policy statement prohibiting drug testing in Michigan, and petitioners cite none. Nothing shown by petitioners warrants this Court's reexamination of this settled state law principle, particularly when petitioners did not even assert a discharge in violation of public policy claim.

Even the *Borse* court noted that courts in several jurisdictions have held that urinalysis programs conducted by private employers do *not* violate the public policy exception to the employment-at-will doctrine in the absence of public policy *expressed by the legislature.* Pennsylvania courts, on the other hand, recognize judicial opinion alone as competent evidence of public policy. 963 F.2d at 620. Therefore, because *Borse* is not based on statutory public policy or a legislative statement, it would not be precedent for Michigan courts, and it is not in conflict with or even applicable to this case.

The Third Circuit went a step further and distinguished the Sixth Circuit's decision in *this particular case by name* from its holding in *Borse. See* 963 F.2d at 622, n. 11. The Third Circuit noted that Michigan law permits an employer to use "intrusive and even objectionable means to obtain employment-related information about an employee." In contrast, Pennsylvania courts apply the

same standards to non-employment and employment related invasion of privacy actions. *Id.* Once again, Michigan law departs significantly from that of Pennsylvania, and *Borse* is legally distinguishable from this case.

This Court has held that as to questions of state law, a perceived conflict among the circuits is not a reason for granting certiorari. The "conflict" may be, as it is here, merely corollary to a permissible difference of opinion among state courts. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206, ___ S.Ct. ___ (1937).

B. Borse Is Factually Distinguishable From This Case.

Even if *Borse* were precedent for this case, it is factually distinguishable. The *Borse* court noted that there was no suggestion in the record of how the employer's urinalysis program was conducted. 963 F.2d at 626. Therefore, the trial court and the Third Circuit were without certain facts they needed to determine whether the drug testing program constituted a highly offensive intrusion upon the plaintiff's privacy.

In this case, however, the record below is very detailed as to the growing employee drug problem at the Trim Division and the safety and production reasons for implementing the Eagle-Picher urinalysis program. The record is also replete with the reasonableness of the circumstances surrounding Eagle-Picher's urine collection procedure. Given the facts in this case, the two scenarios outlined by the Third Circuit which might support a finding of invasion of privacy in Pennsylvania are simply not present here. First, the actual void was not observed

during the Eagle-Picher drug testing program. (Aslanian Aff, ¶ 12) Second, the drug tests were aimed at detecting *only* the presence of certain illegal drugs as opposed to other medical information. (Aslanian Aff, ¶ 13) The *Borse* court stated that under these circumstances, a reasonable person would likely *not* find the program highly offensive so as to amount to an actionable invasion of privacy. 963 F.2d at 624. Therefore, even if *Borse* were precedent for this case (which it is not), it is factually distinguishable and not in conflict with the decision of the Sixth Circuit.

C. Petitioners' Argument Regarding Wrongful Discharge In Violation Of Public Policy Is Not Properly Before This Court.

Petitioners have never raised a claim of wrongful discharge in violation of public policy in any of their three amended complaints or in their briefs to the lower courts. Other than citing *Borse* as conflicting with the Sixth Circuit decision in this case, petitioners still have not raised wrongful discharge in violation of public policy as a claim to be reviewed in its argument to this Court. Therefore, the public policy exception to the employment-at-will doctrine as discussed in *Borse* is not properly before this Court.

Even if petitioners properly raised the public policy exception to the employment-at-will doctrine, the *Borse* case has been remanded to the trial court for further proceedings. The public policy analysis which petitioners claim conflicts with the Sixth Circuit decision in this case has not been satisfactorily defined or resolved by the

Pennsylvania courts. Therefore, this perceived conflict is not even ripe for consideration by this Court.

This Court should only be burdened with *actual* conflicts among the circuits which impair uniformity of decision where uniformity is significant. Here, the only perceived conflict of opinion among the circuits is due to the particular law of each state and particular facts of each case. Therefore, a writ of certiorari should not issue to review the decision below.

II. THE ISSUES IN THIS CASE ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION BECAUSE THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

The issues in this case involve only issues of Michigan common law and are too narrow to warrant review by this Court on certiorari. This case does not in any sense concern constitutional privacy rights because there is no state action. It does not involve any issue of federal law. It involves only principles of Michigan contract, defamation and invasion of privacy law which are well established and have been long-settled by Michigan courts.

The only real arguments petitioners raise turn on the undisputed unique facts of this case as applied in the context of state law principles. In essence, petitioners ask this Court to make a third review of the record to see if it can find what two previous courts have been utterly unable to find – an unlawful intrusion into petitioners' seclusion, breach of an alleged employment contract, and defamation. This Court has held that such fact canvassing

is not a task to be served by a grant of certiorari: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227, ___ S.Ct. ___ (1925).

Petitioners cannot reasonably expect this Court to ensure that every case in a federal court is decided as every other federal or state court would have decided it. Instead, this Court should confine its interposition to cases in which a federal circuit court has announced a rule, potentially governing a substantial number of other cases, in direct conflict with a rule announced by an authoritative state court decision. That has not occurred in this case. As shown below, the lower courts' decisions are fully supported by and consistent with established state law. Certiorari should therefore be denied.

III. THE TRIAL COURT AND SIXTH CIRCUIT GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM FAIRLY AND CORRECTLY.

The trial court's and the Sixth Circuit's opinions below were accurate, fair, and fully in accord with cases in Michigan as well as other jurisdictions. Petitioners have made a conclusory argument that the Sixth Circuit holding "detrimentally alters Michigan law" but they have cited no cases or legal theories to support this proposition. (Petitioners' Brief at 12, 37) The lower courts' decisions are based on well-established doctrines with regard to the state law issues of breach of contract, defamation and invasion of privacy, and petitioners' claims were properly dismissed. Any result other than the one

reached by the courts below would have been directly contrary to Michigan law.

A. Petitioners' Breach Of Contract Claim Was Properly Dismissed By The Lower Courts.

1. Respondent Did Not, As A Matter Of Law, Breach Any Contract With Petitioners By Not Utilizing Progressive Discipline In Connection With The Employee Drug Testing.

Petitioners argue that respondent's Hourly Employee Handbook created a contract right to progressive discipline and to be discharged only for cause under *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980). The trial court and the Sixth Circuit properly found that petitioners' claim failed as a matter of law for the following reasons:

(1) The provisions of the revised employee handbook clearly indicate that the company was not obligated to utilize the four-step warning system before discharging violators of the company's drug free workplace policy. *See, e.g., Loftis v. G. T. Products, Inc.*, 167 Mich. App. 787, 423 N.W.2d 358 (1988), *lv. app. den.*, 431 Mich. 897 (1988). Both the company's written drug policy and consistent past practice conclusively established that drug related misconduct was a serious offense which would result in immediate discharge.

(2) Unlike the handbooks at issue in *Toussaint*, the Eagle-Picher handbook never stated that employees would be discharged only for cause or only for violation of the listed rules. To the contrary, the handbook as well

as petitioners' employment applications indicated that petitioners were employees-at-will who could be terminated at any time without notice and without cause. When faced with an identical claim based on a list of rules distributed to employees, the Michigan Supreme Court refused to find a just cause employment contract. *See Rowe v. Montgomery Ward & Co.*, 437 Mich. 438, 473 N.W.2d 268, 275 (1991). *Accord Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986).

(3) Even if the Eagle-Picher handbook had created a just cause contract, petitioners were discharged for cause for violating the drug policy. *See, e.g., Obey v. McFadden Corp.*, 138 Mich. App. 767, 360 N.W.2d 292 (1984).

2. Respondent Gave Reasonable Notice To Petitioners Of All Handbook And Policy Revisions.

Petitioners argue that the August, 1989 Eagle-Picher Handbook and its Drug Free Workplace Policy do not define the terms of petitioners' employment because employees were not given reasonable notice of the handbook revisions. (Petitioners' Brief at 29-30) However, the Michigan Supreme Court recently held that an employer can unilaterally change a work policy provided the employer gives affected employees reasonable notice of the amendment. *In Re Certified Question*, 432 Mich. 438, 441, 443 N.W 2d 112 (1989). Reasonable notice does not require *actual* notification. *Grow v. General Products, Inc.*, 184 Mich. App. 379, 386, 457 N.W.2d 167 (1990).

In this case, the Sixth Circuit properly held that the notification method was adequate because Eagle-Picher

clearly posted the new drug policy in several logical and highly visible locations around the plant a month before the drug test. Supervisors further publicized the new policy verbally and it was included in an employee handbook distributed to employees in early August, 1989.

B. Petitioners' Defamation Claim Was Properly Dismissed By The Lower Courts.

1. Respondent's Statements To The Media Were Privileged.

Petitioners argue that Eagle-Picher's President, Michael Aslanian, defamed petitioners in communications to the news media regarding the drug testing. Michigan law recognizes the existence of a qualified privilege to a claim of defamation where the speaker has an interest in the matter being discussed, communicates with a person having a corresponding interest, and acts in good faith. *Swenson-Davis v. Martel*, 135 Mich. App. 632, 636, 354 N.W.2d 288 (1984).

The trial court properly applied this qualified privilege to the actions of respondent Eagle-Picher in this case. Respondent did not seek out media attention concerning its drug problem, the drug testing, and the resulting terminations. Rather, media inquiry was instigated by one of the petitioners. Nearly all of the petitioners have admitted that the Eagle-Picher drug situation was a matter of media notoriety and legal concern. Respondent therefore had an interest in protecting its reputation with its customers, suppliers and potential future employees, by discussing the nature of the problem, the measures

respondent had taken to deal with it, and the positive reaction of the remaining employees.

In order to overcome the qualified privilege, petitioners must plead and offer some proof of actual malice. *Bostetter v. Kirsch Co.*, 319 Mich. 547, 559, 30 N.W.2d 276 (1948). Petitioners failed to allege malice in any of their amended complaints, and they offered no evidence of actual malice by Mr. Aslanian.

Petitioners seek to avoid their lack of evidence of malice by asserting that the Michigan Supreme Court in *Rouch v. Enquirer & News of Battle Creek*, 427 Mich. 157, 398 N.W.2d 245 (1986), *reh. den.*, 428 Mich. 1207 (1987), *later app.*, 184 Mich. App. 19, 457 N.W.2d 74 (1990), *app. granted*, 437 Mich. 1035, 472 N.W.2d 637, *vacated on other grounds*, 440 Mich. 238, 487 N.W.2d 205 (1992), *reh. den.*, 440 Mich. 1209, ___ N.W.2d ___ (1992), replaced the malice requirement with a negligence standard. Petitioners are wrong. In *Rouch*, the Michigan Supreme Court held only that the "qualified public-interest privilege" is inapplicable to protect a media respondent from the claim of a non-public plaintiff on the ground that privilege has been subsumed by constitutional standards. 427 Mich. at 187. The court was very careful to note that its decision had "no effect on other recognized common-law privileges in Michigan." 427 Mich. at 180 n. 13, 200 n. 24. The duty/interest privilege set forth in the *Bostetter* case remains viable and is applicable here.

2. Respondent Did Not Make The Statements Alleged, And The Only Statement Which Might Be Implied Is True As To Most Petitioners.

Petitioners claim that Eagle-Picher defamed them by implying that petitioners must be drug users for refusing to take the mandated test and stating that petitioners were impaired in the performance of their jobs. (Petitioners' Brief at 59)

There is no evidence that Mr. Aslanian or anyone on behalf of respondent ever indicated to the media that any of the petitioners "were impaired in the performance of their jobs" or were drug users. In fact, he never mentioned any employee by name. Petitioners contend, however, that by stating that some unnamed employees failed a drug test and that other unnamed employees refused to take the drug test, Mr. Aslanian implied that everyone in both categories was a drug user. The Sixth Circuit properly held that such an implication cannot be reasonably drawn from respondent's statements and will not support a claim of defamation. *See Baggs v. Eagle-Picher Industries, Inc.*, 957 F.2d 268, 273 (6th Cir. 1992).

Furthermore, in the case of nearly all of the plaintiffs, respondent is protected by the defense of truth. *Bostetter v. Kirsch Co.*, 319 Mich. 547, 559, 30 N.W.2d 276 (1948). All but three of the petitioners admitted that they have used illegal drugs during the period of time they were employed by Eagle-Picher. A person who has admitted using an illegal drug can hardly claim defamation for being labeled a "drug user". Accordingly, separate and apart from the defense of privilege, the lower courts

properly found that petitioners' defamation claim failed as a matter of law.

C. The Trial Court And Sixth Circuit Properly Dismissed Petitioners' Claim That The Drug Testing Violated Petitioners' Expectation Of Privacy.

Petitioners argue that the means and implementation of the company's drug test was an unwarranted intrusion into their seclusion under Michigan common law.[4] The elements of that claim have been held to be the following:

(1) an intrusion by defendant;

(2) into a matter which plaintiff has a right to keep private;

(3) by the use of a method which is objectionable to the reasonable person.

Lewis v. Dayton-Hudson Corp., 339 N.W.2d 857 (Mich. App. 1983) (citing *Earp v. Detroit*, 16 Mich. App. 271, 276-277, 167 N.W.2d 841 (1969)).

Applying those elements to the facts of this case, the lower courts properly found that petitioners' privacy claim failed as a matter of law for the following reasons:

(1) There was no intrusion into a matter which the petitioners had a right to keep private. Under Michigan law, an employee's right to privacy may be outweighed by a legitimate business interest. *Saldana v. Kelsey-Hayes*

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[4] Those petitioners who declined to take the test have no claim for invasion of privacy. *See Gretencord v. Ford Motor Co.*, 538 F. Supp. 331 (D. Kan. 1982).

Co., 178 Mich. App. 230, 443 N.W.2d 382 (1989), *lv. app. den.*, 435 Mich. 857 (1990). Petitioners' interest in engaging in illegal drug activity certainly did not outweigh respondent's legitimate interest in running a safe, efficient and productive business which provides job opportunities for its employees.

(2) The method of conducting the drug test in this case was not offensive to a reasonable person. Of approximately 230 people tested, well over 200, including many of the petitioners, have never made any objection to the collection process. The testing was carried out under controlled conditions reasonably designed to assure privacy and accuracy. The collection process was handled by nurses. The void itself was unobserved. All females used toilet stalls, and any male employee would have been allowed to do so upon request. No one made such a request. All positive tests were confirmed by GC/MS for 100% accuracy. The number of people present in the men's lavatory during the testing process was less than the number ordinarily present during break time. (Aslanian Aff, ¶ 12) In summary, the collection process was no more offensive than the normal use of a public restroom.

Petitioners do not dispute any of these facts. Instead, they rely on comments by some of the people involved in monitoring the test and handling the paperwork who complained about the working conditions, long hours, and pressure to speed up the testing process. These comments are totally immaterial to the issue of privacy. No petitioner has contended that his or her privacy was invaded by being rushed. No petitioner has claimed that the test results were inaccurate.

The only Michigan case, state or federal, of which respondent is aware concerning a claim of invasion of privacy in the context of private employer drug testing is *DiTomaso v. Electronic Data Systems*, 3 I.E.R. Cases 1700 (E.D. Mich. 1988), which plaintiffs omit entirely from their brief. The plaintiffs in that case were four security guards who were discharged after urinalysis tests proved positive for use of marijuana. One of the plaintiffs' many claims in *DiTomaso* was that the drug testing constituted an invasion of privacy under Michigan common law. The plaintiffs contended that their off-duty illegal drug use is "by right a private matter unless or until defendant can show that it affects their work performance." The court disagreed and held that the right to be free from intrusion is not absolute and does not extend so far as to subvert those rights which spring from business relations. The court concluded that defendant had a significant interest in assuring that its security officers were free of drug use prior to the formation of any specific suspicion.

The only Michigan case relied on by petitioners, *Harkey v. Abate*, 131 Mich. App. 177, 346 N.W.2d 74 (1983), is readily distinguishable from this one. There, the court held that surreptitious observation panels in the ceiling of a public restroom allowing defendant to observe the petitioner and her daughter constituted an invasion of privacy. The installation of such panels is a felony under Michigan law, and the defendant made absolutely no effort to show any business reason for the see-through panels. In addition, the plaintiffs had no idea they were subject to observation. In this case, Eagle-Picher had a

legitimate business reason for the intrusion, and submission to drug testing, which is not unlawful, was a stated condition of petitioners' employment.

D. Courts Of Other Jurisdictions Have Rejected Invasion Of Privacy Claims In The Context Of Private Employer Drug Testing.

A growing number of courts in other jurisdictions have considered and rejected claims arising out of drug testing by private employers, including claims of common law invasion of privacy. *See Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497 (Tex. App. 1989); *Texas Employment Commission v. Hughes Drilling Fluids, Inc.*, 746 S.W.2d 796 (Tex. Civ. App. 1988), *writ of error den.*, 4 I.E.R. Cases 1824 (Tex. S.Ct. 1989). Petitioners make no effort to address these cases.

Instead, petitioners have cited numerous cases involving the Fourth Amendment as if this case involved a public employer. It does not. But, even in cases involving governmental action which is subject to the restraints of the Fourth Amendment, this Court has approved drug testing of railroad and Customs Service employees *without* individualized suspicion that a particular employee had a drug problem. *See Skinner v. Railway Labor Executives Ass'n.*, 489 U.S. 602, 109 S.Ct. 1402 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989). Although these cases are inapplicable to a private employer, they show that even where an employee's right to privacy is constitutionally protected, an employer may nevertheless have legitimate interests which outweigh the employee's privacy right and permit

a program of employee drug testing without individualized suspicion of drug use. The employer's right to engage in such a program is far greater where, as here, there is no constitutional protection.

What petitioners are asking this Court to do is to ignore established Michigan common law principles and in effect "legislate" out of existence drug free workplace policies and company-wide drug testing programs like those of Eagle-Picher by creating a federal common law more to petitioners' liking. This Court should decline that invitation, just as the lower courts have. Any decision to limit the otherwise legally permissible means by which a private employer may deal with an employee drug problem should only be made by Congress or the state legislature, and to date neither has done so, perhaps reflecting a recognition of the magnitude of the drug problem and the need for employer flexibility in combating it. Under established Michigan law and the undisputed record evidence, the lower courts properly found that petitioners have no claim for invasion of privacy.

CONCLUSION

For the reasons set forth above, petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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